148 US 137

RECORD, CASE No. 15,224.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1254.

HENRY BIER, PLAINTIFF IN ERROR,

vs.

J. BURRUSS McGEHEE.

IN ERROR TO THE COURT OF APPEALS FOR THE PARISH OF ORLEANS AND STATE OF LOUISIANA.

FILED DECEMBER 3, 1892.

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1 To the honorable the judges of the civil district court in and for the parish of Orleans, La.:

The petition of J. Burruss McGehee, a resident of the parish of West Feliciana, State of Louisiana, with respect represents—

That on or about the 17th day of the month of May, 1888, your petitioner purchased through his agent and broker, Charles L. C. Dupuy, of this city, from Henry Bier, also a resident of this city, a paper denominated and represented to be a consolidated bond of the State of Louisiana for the sum of one thousand dollars, for and in consideration of the sum of $911.25 in cash paid to said Bier.

That said pretended bond was numbered 788 and set forth as follows: that "The State of Louisiana by these presents hereby acknowledges itself to be indebted to bearer in the sum of one thousand dollars, which sum it promises to pay, in lawful money of the United States, at the office of the State treasurer, in the city of New Orleans, State of Louisiana, on demand, after the first day of January, 1874 A. D., with interest at the rate of seven per cent. per annum, reduced to four, payable semi-annually, in lawful money of the United States, at the office of the State treasurer, city of New Orleans, State of Louisiana, or at the office of the fiscal agent of the State of Louisiana in the city of New York, State of New York, on the first day of July and January of each year, upon the surrender of the coupons hereto annexed as they shall become due."

And said bond further sets forth that "this bond is issued under authority of and in conformity with an act of the General
2 Assembly of the State of Louisiana approved January 24th, 1874, being act 3 of the session of the year 1874."

And which bond was signed by the governor, auditor, secretary of the State of Louisiana. All of which will more fully appear by reference to said bond, hereto annexed and made part hereof and marked Exhibit "A."

That after the purchase of said bond and payment therefor, as above set forth, it was claimed by the State of Louisiana, through the attorney general, as its property, and that it was stolen by one E. A Burke from the State treasurer, and the return of said bond, with the amount received in payment of the coupons, viz., the sum of sixty dollars thereon, was demanded by said attorney general, as will more fully appear by reference to the letter, hereto annexed and marked Exhibit "B."

Petitioner avers that said bond, with the coupons thereon, was so purchased by him under the full belief that said Bier was the lawful owner thereof; but petitioner avers that he was not at the time of said sale by him, or since, the owner thereof, and petitioner has good reason to believe and so charges — was then and is now the lawful property of the State of Louisiana and is part of the Mechanical & Agricultural College Fund held by said State.

That said bond is now worthless in his hands.

Petitioner alleges amicable demand and the refusal of said defendant to repay, or to substitute a valid State bond for like amount in place thereof, though he has offered to return said bond, with the coupons thereon not paid, together with the said sum of sixty
3 dollars received for account of coupons due and paid in error, to said Bier on the return to him of the amount which he has paid, with legal interest from the 17th day of May, 1888, as will more fully appear by reference to the procès verbal of tender thereof made by W. Morgan Gurley, not. pub., hereto annexed and made part hereof & marked Ex. "C."

Wherefore petitioner prays that said Henry Bier be cited to appear and answer this demand, and after due proceedings had judgment be rendered in his favor, decreeing the said sale of the said Louisiana State bond No. 788 to be rescinded and said Bier be condemned to take back said bond, with the coupons attached, and said sum of sixty dollars received for the coupons paid in error, and that the said Bier be condemned to pay your petitioner the full sum of nine hundred and eleven dollars and 25 cents, with five per cent. interest from the 17th day of May, 1888, until paid, and costs of this suit, and for all further general relief.

(Signed) F. L. RICHARDSON, *Of Counsel.*

Dec. 9th, 1889.

(Endorsed:) No. 28728. Civil district court, parish of Orleans, La. J. Burruss McGehee *vs.* Henry Bier. Petition & Ex'ts "A & B." Div. "D." F. L. Richardson, attorney. Filed Dec. 10th, '89. (Signed) Th. Buisson, d'y cl'k.

4 *Citation.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 28728.

Mr. Henry Bier, New Orleans:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the civil district court for the parish of Orleans within ten days after service hereof.

Witness the Honorables T. C. W. Ellis, F. D. King, F. A. Monroe, N. H. Rightor, A. Voorhies, judges of the said court, this 10th day of December, in the year of our Lord 1889.

(Signed) ALEX. LUMINAIS, *D'y Cl'k.*

Court-house, opposite Jackson square.

(Endorsed:) No. 28728. Civil district court for the parish of Orleans. J. Burruss McGehee *vs.* Henry Bier. F. L. Richardson, attorney.

Copy of petition and citation inside to be served on defendant, New Orleans.

Received December 10th, 1889, and on the 11th of December, 1889, I served a copy of the within citation and accompanying petition personally on Henry Bier, defendant herein. Returned same day.
(Signed) PETER McGRATH, *D'y Sh'ff.*

5 *Act of Tender.*

UNITED STATES OF AMERICA, }
State of Louisiana, Parish of Orleans, City of New Orleans. }

Act of tender to Henry Bier.

Be it known that on this ninth day of the month of December, A. D. 1889, I, Walter Morgan Gurley, a notary public duly commissioned and qualified in and for this city and parish of Orleans, accompanied by F. Rivers Richardson and Henry J. De Lisdernier, competent witnesses residing in this city, did proceed to the office of Henry Bier, Esq., No. 28 Carondelet street, in this city, at the hour of 3.30 o'clock in the afternoon of said date, when, at the request of Mr. J. Burruss McGehee, in the presence and within the hearing of said witnesses, I, notary, did tender and offer to Henry Bier, for and in the name of said Mr. J. Burruss McGehee, a certain paper denominated as and purporting to be a consolidated bond of the State of Louisiana for the sum of one thousand dollars, numbered 788, and set forth that "the State of Louisiana by these presents hereby acknowledges itself to be indebted to bearer in the sum of one thousand dollars, which sum it promises to pay, in lawful money of the United States, at the office of the State treasurer, in the city of New Orleans, State of Louisiana, on demand after the first day of January, 1874 A. D., with interest at the rate of seven per cent. per annum, reduced to four, payable semi-annually, in lawful money of the United States, at the office of the State treasurer, city of New Orleans, State of Louisiana, or at the office of the fiscal agent of the State of Louisiana in the city of New York, State of New York, on the first day of July and January of each year upon the surrender of the coupons hereto annexed as they become due."

6 "This bond is issued under authority of and in conformity with an act of the General Assembly of the State of Louisiana approved Jan. 24th, 1874, being act 3 of the session of the year 1874," and which said bond was signed by the governor, auditor, and secretary of the State of Louisiana; and I, said notary, did also and at the same time, in the presence of said witnesses and within their hearing, tender to and count out to said Henry Bier the sum of sixty-five dollars in United States legal-tender notes, and then stated to the said Henry Bier that said J. Burruss McGehee claimed to

have purchased said bond from him, Bier, through one Charles L. C. Dupuy, of this city, in good faith, on or about the month of May, 1888; that said bond now proves to be worthless. I, notary, then tendered said Henry Bier said bond with the amount of the coupons collected by said J. Burruss McGehee thereon, viz., sixty dollars, together with interest on said amount up to date, viz., five dollars; and I, notary, did demand, in the name of said J. Burruss McGehee, of the said Henry Bier the payment in exchange of the amount of the purchase price of said bond as received by him, Bier, viz., nine hundred and eleven & $\frac{20}{100}$ dollars, together with five per cent. interest thereon from the date of said sale up to date, viz., seventy-two dollars.

Whereupon the said Henry Bier declined to accept said tender of said bond and money as stated or to refund the purchase price paid for said bond and interest thereon as stated, asserting to me, notary, that he did not know Mr. J. Burruss McGehee in the matter, and that he denied having sold him said bond; and here Henry L. Lazarus, present, stated on behalf of Mr. Henry Bier that he, Mr. Bier, had not up to this time heard of Mr. J. Burruss McGehee and did not know him by sight.

7 Whereupon I, said notary, did protest against suc- non-acceptance of said bond and money as tendered and the refusal to return said purc-ase price as stated.

Thus done and passed at my notarial office the day, month, and year first above written, in the presence of aforesaid witnesses, after the reading of the whole.

(Original signed) W. MORGAN GURLEY,
Notary Public.
F. RIVERS RICHARDSON.
H. J. DE LISDERNIER.

I, the undersigned, certify the above and foregoing to be a true & correct copy of the original act on file and of record in my notarial office at New Orleans, Louisiana.

(Signed) W. MORGAN GURLEY,
Notary Public.

(Endorsed:) Exhibit "C." No. 28728. Filed Dec. 10th, 1889. (Signed) Th. Buisson, d'y cl'k.

Exception.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 28728. Civil District Court. Div. "—."

And now into court comes the defendant, Henry Bier, through his undersigned counsel, and excepts to the petition of plain-

8 tiff on the ground that said petition discloses no cause of action.

Wherefore defendant prays that this exception be maintained and that he be hence dismissed with costs.

(Signed) HENRY L. LAZARUS,
HUNTER C. LEAKE,
Att'ys for Defendant.

(Endorsed:) No. 28728. Civil dist. court, div. "D." J. Burruss McGehee *vs.* Henry Bier. Exception. Filed December 21st, '89. (Signed) Alex. Luminais, d'y cl'k. Henry L. Lazarus & Hunter C. Leake, att'ys for def't.

Motion to Fix Exception.

J. BURRUSS MCGEHEE *vs.* HENRY BIER. } No. 28728. Civ. Dist. Court, P'sh of Orleans.

On motion of F. L. Richardson, of counsel for pl't'f in the above-entitled cause, it is ordered that the exception herein filed by def't be fixed for trial on the 24th day of Jan'y, 1890, and that def't be notified hereof.

9 (Endorsed:) 28728. C. D. c't, div. D. J. B. McGehee *vs.* Henry Bier. Motion to fix exception. Filed Jan'y 14th, '90. (Signed) Jules Vienne, d'y cl'k. F. L. Richardson, att'y.

Notice of Trial.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

BURRUSS MCGEHEE *vs.* HENRY BIER. } No. 28728. Division "D."

To Henry Bier, New Orleans:

SIR: Please to take notice that the exceptions filed in this case has been fixed for trial on the 24th day of January, 1890, at 11 o'cl'k a. m.

New Orleans, Jan'y 14, 1890.

(Signed) JULES VIENNE,
Deputy Clerk.

(Endorsed:) No. 28728. Civil district court for the parish of Orleans. Burruss McGehee *vs.* Henry Bier. Notice of trial. Personal serv-e on def't, Henry Bier.

10 Received Jan. 14, 1890, and on the same day, month, and year I served a copy of the within notice of trial personally on Henry Bier, defendant herein. Returned same day.

(Signed) PETER McGRATH, *D'y Sh'ff.*

Continuance.

Extract from the Minutes of January 24th, 1890.

Present: Hon. N. H. Rightor, judge.

J. B. McGehee
vs.
Henry Bier. } No. 28728. Division "D."

This case was continued until next Friday.

Exception Referred to Merits.

Extract from the Minutes of January 31, 1890.

Present: Hon. N. H. Rightor, judge.

J. B McGehee
vs.
Henry Bier. } No. 28728. Div. "D."

The exception filed by defendant was called for trial, and, after hearing counsel for both sides, ordered to be cumulated and tried with the case upon the merits.

Answer.

Civil District Court.

J. Burruss McGehee
vs.
Henry Bier. } No. —. Division "—."

Now into court comes defendant, through his undersigned
11 counsel, and for answer to plaintiff's petition pleads the general issue.

Wherefore he prays to be hence dismissed with costs.

(Signed) HENRY L. LAZARUS,
J. R. BECKWITH, *Of Counsel.*

(Endorsed:) No. 28728. Civil district court. (D.) J. Burruss McGehee *vs.* Henry Bier. Answer of defendant. Filed Feb'y 4, '90. (Signed) Alex. Luminais, d'y cl'k. Henry L. Lazarus, attorney for defendant.

Supplemental Answer.

Civil District Court.

J. Burruss McGehee
vs.
Henry Bier. } No. 28728. Division "D."

Now into this hon. court, through his undersigned counsel, comes

Henry Bier, and for supplemental answer to plaintiff's petition respondent says:

He denies specially that he ever was the holder, owner, or possessor of the bond or obligations described in plaintiff's petition herein, and denies that he ever sold or delivered the same, as averred in the pleadings herein.

12 And, further answering, respondent sayeth that as to and concerning each and every bond of the State of Louisiana of the class or description set forth in the pleadings and exhibits in this cause, or of the class of bonds commonly called "consolidated bonds of the State of Louisiana," or of the description of bonds provided for and issued under the warrant and authority of act No. 3 of the act of 1874, approved January 24th, 1874, or under the act of the legislature referred to in the bond set up and described in the plaintiff's petition herein.

This defendant never at any time purchased, held, possessed, or in any manner acquired any such bond or obligation that was not by him acquired in good faith, in the open markets of the country, before maturity thereof in the due and regular course of trade, as commercial paper or obligations whereof the title passed by delivery, protected in the hands of innocent, good-faith third holders by the law of the land in relation thereto, and without any knowledge, information, or suspicion of any defect, defence, or equity that could under any circumstances be urged against said bonds, or in any way altering or effecting the binding effect of the contract and obligations as written in said bond or obligation.

And, further answering, defendant sayeth, as to and concerning any and all acts or supposed laws or regulations of the State of Louisiana supposed to affect, impair, or tending to impair the contract as it appears and is written in the said consolidated bonds of the State of Louisiana issued under and by virtue of the said act of the State of Louisiana adopted or approved January 24th, 1874, being act No. 3 of the acts of 1874, and the act referred to in said

13 bond, as to in any way reduce or destroy the value thereof in the hands of *bona fide* holders thereof acquiring same before maturity, the same are and at all times have been null and void for repugnance to the provisions of the Constitution of the United States.

Wherefore respondent prays that he be hence dismissed with his costs, and for general relief.

(Signed) J. R. BECKWITH,
H. L. LAZARUS,
Attorney- for Defendant.

(Endorsed:) No. 28728. Civil district court, div. "D." J. Burruss McGehee *vs.* Henry Bier. Supplemental answer. Filed Feb'y 7th, '90. (Signed) Jos. L. Percy, d'y cl'k. Henry L. Lazarus, attorney for defendant.

Notices of Interrogatories.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 28728.

To Henry L. Lazarus, Esq., New Orleans:

Whereas the plaintiff in the above-entitled cause this day filed in the office of the clerk of this court certain interrogatories, a
14 copy of which accompanies this notice, propounded to W. H. Pipes & O. B. Steele, witnesses for said plaintiff residing at ——, whose answers to the said interrogatories are to be taken under commission for that purpose to be issued, and to be read in evidence on the trial of said cause.

You are notified to propound such cross-interrogatories as you may deem necessary, and leave the same at this office within three days from the service hereof.

Clerk's office, civil district court, this 1st day of April, 1890.

[SEAL.] (Signed) ALEX. LUMINAIS, *D'y Cl'k.*

(Endorsed:) No. 28728. Civil district court. J. Burruss McGehee *vs.* Henry Bier. F. L. Richardson, attorney. Notices of interrogatories and copy. Serve on Henry L. Lazarus, Esq., New Orleans.

Received April 1, 1890, and on April 2nd, 1890, I served a copy of the within notice of interrogatories and accompanying interrogatories & petition personally on Henry L. Lazarus herein named. Returned same day.

(Signed) PETER McGRATH, *D'y Sh'ff.*

Filed April 5th, '90.

(Signed) JOS. L. PERCY, *D'y Cl'k.*

15 *Motion.*

Civ. Dist. Court, P'sh of Orleans, La.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 28728.

On motion of F. L. Richardson, of counsel for def't in the above-entitled cause, and on suggesting the annexed affidavit, it is ordered that a commission do issue to any judge, justice of the peace, or notary public in & for the parish of East Baton Rouge to take the testimony of O. B. Steele and W. H. Pipes, witnesses for pl'ff, residing in said parish, to the annexed interrogatories and cross-interrogatories in the cause, and that a delay of thirty days be granted for this purpose.

Before me, the undersigned authority, appeared F. L. Richardson, who, being duly sworn, deposes and says that the testimony of said witnesses, O. B. Steele and W. H. Pipes, is necessary and material to the determination of this cause, and that he makes this affidavit to the best of his knowledge & belief as counsel for pl'ff, who is now absent from this parish.

(Signed) F. L. RICHARDSON.

Sworn to and subscribed before me this 9th day of April, 1890.

(Signed) ALEX. LUMINAIS, *D'y Cl'k.*

(Endorsed:) No. 28728. Civil district court, parish of Orleans. J. Burruss McGehee *vs.* Henry Bier. Motion for commission. Filed April 9, '90. (Signed) Alex. Luminais, d'y cl'k.

16 *Continuance.*

Extract from the Minutes of May 12, 1890.

Present: Hon. N. H. Rightor, judge.

J. B. McGehee
vs.
Henry Bier. } No. 28728. Div. "D."

This case was continued with preference.

Motion.

Civil Dist. C't, Div. D.

J. Burruss McGehee
vs.
Henry Bier. } No. 28728.

On motion of F. L. Richardson, counsel for pl'ft in above-entitled cause, and on suggesting to the court that the testimony of O. B. Steele & W. H. Pipes, residents of the city of Baton Rouge, is necessary and material to his cause, as appears by the annexed affidavit, it is ordered that a com'n do issue to any judge or justice of the peace in and for the parish of East Baton Rouge to take the testimony of said witnesses and their answers to the annexed interrogatories and cross-interrogatories, and that a delay of twenty days be granted for that purpose.

Before me, the undersigned authority, appeared Frank L. Richardson, who, being duly sworn, deposes and says that the testimony of said above-named witnesses is necessary and material in his cause.

(Signed) FRANK L. RICHARDSON.

Sworn to and subscribed before me this 14th day of May, 1890.

(Signed) ALEX. LUMINAIS, *D'y Cl'k.*

17 (Endorsed:) 28728. Civil dist. c't. McGehee *vs.* Bier. Motion & aff't for commission. Filed May 14, '90. (Signed) Jules Vienne, d'y cl'k.

Interrogatories.

Civ. Dist. Court, P'sh of Orleans, La.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } 28728.

Interrogatories to be propounded to O. B. Steele and W. H. Pipes, witnesses for pl'ft in the above-entitled cause, by virtue of the commission hereunto annexed, to be answered by each witness separately.

Int'y 1st. What is your full name, age, and occupation?

Int'y 2d. Where do you reside and what office do you hold?

Int'y 3d. Do you know what State bonds belong to the Agricultural & Mechanical College fund of the State of La. and declared to be null and void after the first day of Jan'y, 1880, by art. 233 of the State constitution?

Int'y 4. If you state that you do know, from what source do you get your information?

Int'y 5th. What numbered bonds of the State belong to said fund?

Int'y 6th. Was any public notice given that said numbered bonds belonged to the State of La.?

18 Int'y 7th. If you answer yea, where was said public notice given and had? And if you have a copy of said publication annex the same to your answer.

Int'y 8. By whom was said publication made?

Int'y 9th. To whom does the bond herein sued upon and claimed to have been bought from Henry Bier, def't herein, and described in the certified copy of the petition in the above-entitled cause hereto annexed, belong?

Int'y 10th. If you say it belonged to the State, state how the possession of the State was lost or has it came to be out of its possession.

Int'y 11th. Who is the custodian of the bonds belonging to the Agricultural & Mechanical fund?

Int'y 12th. State any other matter or thing of importance to either party to this controversy and within your own personal knowledge.

In behalf of pl'ft.

(Signed) F. L. RICHARDSON, *Of Counsel.*

(Endorsed:) Copy. 28728. C. D. c't, div. D. McGehee *vs.* Bier. Interrogatories. Filed April 1st, 1890. (Signed) Alex. Luminais, d'y cl'k.

Cross-Interrogatories.

Civil District Court.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 28728. Division "—."

Now comes Henry Bier, through J. R. Beckwith and Henry L. Lazarus, his counsel, and, reserving the benefit of all objections to the testimony of O. B. Steel & W. H. Pipes, to be taken under the commission issued herein and to be read upon the trial of
19 this cause, for cross-interrogatories to said witnesses this respondent propounds the following questions:

First.

When did your official relations begin with the fiscal department of the government of the State of Louisiana, and had you any knowledge particularly of the fiscal affairs of the government prior to your official relations?

Second.

If in answer to the third direct interrogatory you undertake to state what bonds belonged to the Agricultural & Mechanical College fund, you will state whether this information is of and within your personal knowledge or whether the information is gathered from reports and statements of third persons.

Third.

If in answer to the sixth interrogatory you state that there was public notice given, state whether that is a fact within your personal knowledge, how said notice was given, and by what authority, and whether within your personal knowledge the publication of the fact was brought to the public's notice.

Fourth

Be particularly careful in answering the tenth direct interrogatory and state only matter within your personal knowledge. If you undertake to say how possession of the State was lost, state when you first had knowledge of the same, and could not the pretended loss have occurred long prior to your knowledge of the same?

20 Fifth.

In answering the twelfth direct interrogatory you will confine your statements specifically to matters within your personal knowledge and not speak or testify from hearsay.

(Signed) HENRY L. LAZARUS, *Att'y.*

(Endorsed:) No. 28728. Civil district court. J. Burruss McGehee *vs.* Henry Bier. Cross-interrogatories. Filed April 7, '90. (Signed) Alex. Luminais, d'y cl'k. Henry L. Lazarus, attorney for ——.

Certified Copy of Petition Annexed to the Direct Interrogatories.

To the honorable the judges of the civil district court in and for the parish of Orleans, La.:

The petition of J. Burruss McGehee, a resident of the parish of West Feliciana, State of Louisiana, with respect represents—

That on or about the 17th day of the month of May, 1888, your petitioner purchased, through his agent and broker, Charles L. C. Dupuy, of this city, from Henry Bier, also a resident of this city, a paper denominated and represented to be a consolidated bond of the State of Louisiana for the sum of one thousand dollars,
21 for and in consideration of the sum of $911.25 in cash paid to said Bier.

That said pretended bond was numbered 788, and set forth as follows: "That the State of Louisiana by these presents hereby acknowledges itself to be indebted to bearer in the sum of one thousand dollars, which sum it promises to pay, in lawful money of the United States, at the office of the State treasurer, in the city of New Orleans, State of Louisiana, on demand, after the first day of January, 1874 A. D., with interest at the rate of seven per cent. per annum, reduced to four, payable semi-annually, in lawful money of the United States, at the office of the State treasurer, city of New Orleans, State of Louisiana, or at the office of the fiscal agent of the State of Louisiana, in the city of New York, State of New York, on the first day of July and January of each year, upon the surrender of the coupons hereto annexed as they shall become due."

And said bond further sets forth that "this bond is issued under authority of and in conformity with an act of the General Assembly of the State of Louisiana approved January 24th, 1874, being act 3 of the session of the year 1874.

And which bond was signed by the governor, auditor, secretary of the State of Louisiana. All of which will more fully appear by reference to said bond, hereto annexed and made part hereof and marked Exhibit "A."

That after the purchase of said bond and payment therefor, as above set forth, it was claimed by the State of Louisiana, through the attorney general, as its property, and that it was stolen by one E. A. Burke from the State treasurer, and the return of said bond, with the amount received in payment of the coupons, viz.,
22 the sum of sixty dollars thereon, was demanded by said attorney general, as will more fully appear by reference to the letter hereto annexed and marked Exhibit "B."

Petitioner avers that said bond, with the coupons thereon, was so purchased by him under the full belief that said Bier was the lawful owner thereof, but petitioner avers that he was not at the time

of said sale by him, or since, the owner thereof, and petitioner has good reason to believe, and so charges — was then and is now the lawful property of the State of Louisiana, and is part of the Mechanical and Agricultural College fund held by said State.

That said bond is now worthless in his hands.

Petitioner alleges amicable demand and the refusal of said defendant to repay, or to substitute a valid State bond for like amount in place thereof, though he has offered to return said bond with the coupons thereon not paid, together with the said sum of sixty dollars received for account of coupons due and paid in error to said Bier, on the return to him of amount which he has paid, with legal interest from the 17th day of May, 1888, as will more fully appear by reference to the procès verbal of tender thereof made by W. Morgan Gurley, not. pub., hereto annexed and made part hereof and marked Ex. "C."

Wherefore petitioner prays that said Henry Bier be cited to appear and answer this demand and, after due proceedings had, judgment be rendered in his favor decreeing the said sale of the said Louisiana State bond No. 788, to be rescinded, and said Bier be condemned to take back said bond, with the coupons attached, and said *bond* of sixty dollars received for the coupons paid in
23 error, and that the said Bier be condemned to pay your petitioner the full sum of nine hundred and eleven dollars and
25 cents, with five per cent. interest from the 17th day of May, 1888, until paid, and costs of this suit, and for all further general relief.

(Signed) F. L. RICHARDSON, *Of Counsel.*

Dec. 9th, 1889.

A true copy.

(Signed) H. MOLAISON, *D'y Cl'k.*

(Endorsed:) No. 28728. Civil dist. court, parish of Orleans. Copy of the original petition.

Depositions.

Civ. Dist. Court, Parish of Orleans, La.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 28728.

Depositions of Wm. H. Pipes and O. B. Steele, residents of the parish of East Baton Rouge, State of La., witnesses produced and examined on the day hereinafter stated, before me, Thos. B. Dupree, notary public, duly commissioned and qualified, in and for the parish of East Baton Rouge, State of Louisiana, under and by virtue of the annexed —, issued out of the civil district court of Orleans parish, La., to take depositions in a certain case pending at issue between J. Burriss McGehee, plaintiff, and Henry Bier, defendant.

24 WM. H. PIPES, a resident of the parish of East Baton Rouge, La., being duly sworn on the Bible on this the 16th day of

May, 1890, doth depose and says as follows in answer to interrogatories:

First Int. Wm. H. Pipes.
Int. 2nd. Baton Rouge; State treasurer.
Int. 3rd. Yes.
Int. 4th. From the reports of the State treasurer for the year 1879, page 61, and which corresponds with the statement in the hands of the secretary of the board of supervisors of A. & M. college.
Int. 5th. See numbers, page 61 Treasurer's report 1879, hereto annexed.
Int. 6th. Yes.
Int. 7th. Treasurer's report, which numbers them, and article 233 of the State constitution, which declared said bonds null and void.
Int. 8th. Answered above.
Int. 9th. To the State of Louisiana.
Int. 10th. That is a question for the courts to decide.
Int. 11th. The treasurer of the State.
Int. 12th. I believe I have answered all I know about the matter.

Answers to Cross-Interrogatories.

25 X Int. 1st. Since the first ——, 1888. None special.
X Int. 2nd. From official reports, *i. e.*, —.
X Int. 3rd. I cannot answer this now — fully than I have. The information is in official publications. I have no personal knowledge that any one read the treasurer's report of 1879.
X Int. 4th. About Sept. 1st, 1889, by personal investigation. Committee of both houses of the legislature of 1882 found these bonds in the possession of the State treasurer. Since that date no law has been passed or enacted to transfer the custody of said bonds from the treasurer. Since that date they have disappeared from the treasury.

(Signed) W. H. PIPES,
Treas. State of La.

Sworn to and subscribed before me, notary, this the 16th day of May, 1890.

(Signed) THOS. B. DUPREE,
Notary Public.

Depositions of O. B. Steele.

O. B. STEELE, a resident of the parish of East Baton Rouge, State of Louisiana, being duly sworn on the Bible this the 17th day of May, A. D. 1890, doth depose and say as follows in answer to interrogatories:

26 Int. 1st. O. B. Steele.
Int. 2nd. Baton Rouge, La.; State auditor.
Int. 3rd. Yes.
Int. 4th. From the records of the *records of the* offices of the treasurer and auditor of the State of Louisiana.

Int. 5th. According to the coupon books of the auditor's office and other records, the numbers given in the treasurer's report for for 1879 are correct.

Int. 6th. Yes.

Int. 7th. It was given Jan'y, 1879, by publication of the treasurer's report to the governor of the State of Louisiana.

Int. 8th. Answered above.

Int. 9th. The State of Louisiana.

Int. 10th. All I know is that it is out of the possession of the State.

Int. 11th. The treasurer of the State of Louisiana.

Int. 12th. I know nothing more.

Answers to Cross-Interrogatories.

X Int. 1st. May, 1884. Yes; I was a member — State legislature from 1876 to 1884..

X Int. 2nd. It is from reports, records, and official documents.

27 X Int. 3rd. Yes; I know that the publication was made as above stated, as it was laid on my desk as well as on the desks of the other members of the legislature in January, 1880.

X Int. 4th. The first knowledge that I had that the bonds above referred to were missing was in September, 1889.

(Signed) O. B. STEELE.

Sworn to and subscribed before me, notary, this the 17th day of May, A. D. 1890.

(Signed) THOS. B. DUPREE, *Not. Pub.*

I, Thos. B. Dupree, a notary public, duly commissioned and qualified, in and for the parish of East Baton Rouge, State of Louisiana, do hereby certify that I caused Wm. H. Pipes and O. B. Steele, witnesses heretofore named and examined, to appear before me at the times and place above named, and, after publicly and solemnly swearing them to tell the whole truth and nothing but the truth in answer to the annexed interrogatories—

I then and there proceeded to examine them by propounding to them the said interrogatories and reducing in my presence and in that of the said witnesses their answers in writing, with my own hand, and caused the said witnesses to sign their names hereto in my presence as above stated.

In testimony whereof I have hereunto set my hand and seal on this the 17th day of May, A. D. 1890.

(Signed) THOS. B. DUPREE,
Notary Public, Baton Rouge, La.

Fee, $10.00.

28 *Commission.*

THE STATE OF LOUISIANA:

To any judge, justice of the peace, or notary public in and for the parish of East Baton Rouge, Louisiana, Greeting:

No. 29728.

Know ye that we, reposing confidence in your prudence and fidelity, do by these presents give unto you authority diligently to examine all witnesses whatever, as well on the part of the plaintiff as of the defendant, in a certain suit now pending in the civil district court for the parish of Orleans, wherein J. Burruss McGehee is plaintiff and Henry Bier is defendant.

Witness-: O. B. Steele & W. H. Pipes, witnesses for plaintiff, residing in East Baton Rouge, Louisiana.

Therefore we desire you that, at certain times and places by you to be appointed for that purpose, you cause the said witnesses to come before you; that you then and there examine them apart upon their respective corporeal oaths, first taken before you upon the Holy Evangelists; that you reduce their examinations to writing and cause the witnesses to sign the same, and when you shall so have taken them, that you
29 send the same, with this commission, closed up, under your seal, to us in our civil district court, in the city of New Orleans, without delay.

Witness the Honorable N. H. Rightor, judge of said court, this 14th day of May, in the year of our Lord one thousand eight hundred and ninety, and in the 114th year of the Independence of the United States.

(Signed) ALEX. LUMINAIS,
Deputy Clerk.

(Endorsed:) No. 28728. Civil district court. J. Burruss McGehee *versus* Henry Bier. Commission. Filed February 12th, 1891. (Signed) E. A. Luminais, clerk. Received and opened May 19th, 1890. (Signed) Jos. L. Percy, d'y cl'k.

Testimony.

Civil District Court.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 28728. Division "D."

Testimony taken by consent of parties at the office of Judge H. L. Lazarus, on the 21st day of May, 1890.

30 Present: F. L. Richardson, for plaintiff; H. L. Lazarus, for defendant.

CHARLES L. C. DUPUY, witness for plaintiff, deposes and says:

Examination-in-chief.

By Mr. RICHARDSON:

Q. What is your occupation?

A. I am custodian of the deposit vault of the Whitney National bank.

Q. What was it in the month of May, 1888?

A. I was a stock broker and a member of the New Orleans stock exchange.

Q. What is your full name?

A. Chas. L. C. Dupuy.

Q. How old are you?

A. I am fifty-eight years old.

Q. Mr. Dupuy, do you know Mr. J. Burruss McGehee, plaintiff in this case?

A. Yes, sir; I know him very well.

Q. You know Mr. Henry Bier, the defendant?

A. Yes, sir; I know him.

Q. Did you have any business transactions for Mr. J. Burruss McGehee during the month of May, 1888?

A. Yes, sir; he came here from his home in West Feliciana parish and employed me to buy some bonds for him.

Q. He employed you?

A. Yes, sir; I was his regular broker; I bought all his investments for him.

Q. Did you buy any bonds for him?

A. Yes, sir.

Q. From whom?

A. I bought a number of State bonds. I bought some
31 from Mr. Henry Bier.

Q. What bonds did you buy from Mr. Henry Bier?

A. I have the numbers on the margin of my check book.

Q. Could you tell them without referring to any memorandum?

A. I could not, but I noted them at the time on my check book.

Q. You don't know them without using your memorandum?

A. Of course not.

Q. Did you make a memorandum of the bonds you bought from Mr. Henry Bier?

A. Yes, sir; on the margin of my check book.

Q. When did you make that memorandum?

A. At the time I received the bonds.

Q. The very day, at the time the check was given?

A. Just as soon as I received the bonds I went to my office and got my check book and made a memorandum of *of* the bonds on the margin of my check book. I wrote my check first, and went around to the bank and had it certified, then would go around and get the bonds, and before delivering them I would make my memorandum.

Q. Please give the number of the bonds you bought from Mr. Bier.

(Witness referring to his check book.)

A. Of the thousand-dollar bonds, I received from Mr. Bier the following bonds, No. 2026.

Q. What kind of bonds were they?

A. Louisiana four per cent. bonds. The delivery I mean was made on the 16th of May, 1888. Nos. 2026, 2034, 2059, 2070, 2349, 2844, 3283, 3800, these were in the denomination of a thousand dollars. There were eight bonds. Of the denomination of five hundred dollars, the following numbers: 10, 136, 2461, 2786. Now the delivery by Mr. Bier to me on the 17th of May, 1888, was as follows: of the thousand-dollar bonds each, Nos. 788, 920, 1827, 2142, 2372, 3706, 5403; of the five-hundred-dollar bonds, Nos. 394, 396,
32 442, 478, 594, 770, 848, 1783, 2200, 2352, 2544, 2947, 2958, 2989, 3142, 3143. These bonds were purchased by me from Mr. Bier at the rate of 91⅛.

Q. Who paid him?

A. I paid him.

Q. You gave him a check for the amount?

A. Yes, sir; on the Canal bank.

Q. These bonds, can you describe them?

A. They were bonds issued under the act of '74, that were originally seven per cent., and the interest was reduced to four per cent. They were known as the four per cent. bond.

Q. What did you do with the bonds as you bought them?

A. As fast as I got them I went to Mr. McGee, who was sitting at the Canal bank, and delivered them to him, and I made up a list for him and gave it to him.

Q. How came you to make out a list of these bonds?

A. Because it was my habit for five years previously. I neither bought nor sold bonds without putting the numbers in my check book.

Q. Did Mr. McGee ask you for the numbers?

A. Well, he was making a list of them, and as he was an elderly gentleman I assisted him.

Q. Did you deal with Mr. Bier direct?

A. Yes, sir; of the 25,000 personally between us.

Q. Mr. Bier handed you in person these bonds?

A. Yes, sir; either him or his men in the office.

Q. Where was the bonds given to you at Mr. Bier's office?

A. I could not swear positively. I was in the habit of going to his office and get them.

Q. You remember the conversation you had with Mr. Bier about these bonds?

A. He offered me the bonds for sale, and I bought them.
33 Mr. Bier came between call and offered me bonds. I took 5,000; then he asked me if I could not buy any more, and I did, and I paid him the next day.

Q. What kind of bonds did you ask Mr. Bier for?
A. State bonds.
Q. Louisiana State bonds?
A. Yes, sir; we understood each other, what we were buying and selling.
Q. You remember looking at the coupons?
A. Yes, sir; I always did that.
Q. Were the coupons attached?
A. Yes, sir; on all of them.

Cross-examination by Mr. LAZARUS:

Q. I understand you to say that you bought 25,000 bonds with Mr. Bier?
A. Yes, sir; in lots of 5,000.
Q. He delivered them to you?
A. Yes, sir.
Q. What was known as Louisiana State bonds?
A. Yes, sir; I suppose they were. We did not question the bond itself; it appeared to be regular. The coupon was all right.
Q. The seal of the State was on them?
A. Yes, sir.
Q. Did you make this purchase at one time or on several occasions?
A. I have just stated on different occasions; we generally dealt with 5,000 at the time.
Q. How big an order you had for Mr. McGee?
A. 61,000.
Q. Did you buy bonds from others?
A. The first bonds I bought was from Mr. Bier—25,000; then 5,000 from Mr. E. Eisenhauer.
34 Q. Can you give me the date you received the bonds from Mr. Eisenhauer?
A. I received them from him on the 17th of May, 1888, at the rate of 91.
Q. From who- did you make the next purchase?
A. The other bonds I bought, with a very few exceptions, in the board. The next block was delivered to me on the 18th of May, 1888. Here is the way I bought them: At the 2 o'clock p. m. call, May 17th, 1888, I thought there were 25,000 offered, but it seems when I came to get them there was but 15,000; from Frank A. Lee, 5,000, at 91⅜; from Messrs. Seixas & Brown, 5,000, at 91⅜; from J. L. Herwig, 5,000, at 91⅜. Then they raised the market on me, and I bought 2,000 from Frank A. Lee, at 91¼; J. Townsend, 1,000, at 91¼; J. L. Herwig, 5,000, at 91¼; C. Lesassier, 5,000, 91¼. After the 2 p. m. call I bought 3,000 from J. L. Herwig, at 91¼. They were all delivered to me on the 18th of May, 1888. When I say Frank A. Lee, I mean F. A. Lee & Co.
Q. That makes a total of how many bonds?
A. It ought to make a total of 61,000.
Q. You received from Mr. Bier bonds on the 17th of May, 1888?

A. Some on the 16th, some on the 17th; the 10,000 was delivered on the 16th. The one in question was delivered to me on the 17th of May, 1888.

Q. At what hour — the day the bonds were generally delivered?

A. As soon as convenient; the next day, generally by 10 or 11 o'clock; possibly sometimes brokers were unable to deliver them until later in the day.

Q. The check numbered 324 you gave to Mr. Bier?

A. Yes, sir.

Q. The check you gave Mr. Eisenhauer is numbered 325?

A. Yes, sir; those checks were written before I saw the bonds. I noted the numbers down after I had received the bonds.

35 I generally made the check out and went to the bank and had it certified.

Q. The first thing you did was to draw up check number 324 for the amount of the bonds, payable to Mr. Bier, and one check, No. 325, payable to Mr. Eisenhauer; then delivered them both that morning?

A. Yes, sir.

Q. The next thing you did was to get them certified?

A. Yes, sir.

Q. Then you presented the checks and the bonds were delivered to you?

A. Yes, sir.

Q. Mr. Eisenhauer's office is right next door to Mr. Bier?

A. I think he is upstairs, but I did not get the bonds at the same time.

Q. How many bonds you delivered?

A. 15,000. He delivered to me on the 17th of May, 1888. I mean the face value of the bonds.

Q. How long a time after?

A. I don't remember, but I know I had to make two trips to the bank. I don't recollect which was the first or which was the second, but I went with each batch to the bank. I remember that circumstance. I did not mingle Mr. Eisenhauer's bonds and Mr. Bier's bonds together.

Q. What made you separate them?

A. Because I was in the habit of making my delivery that way. I did not want to take the risk of being robbed; and, if so, of 20,000 instead of 15,000.

Q. Can you state which bonds you got first, the Eisenhauer or Bier bonds?

A. I could not say, but I know I did not get them at the same time.

Q. I don't mean the same instant; but would it not be more than probable that you got them about the same time?

36 A. Yes, sir.

Q. Do you recollect if you went to Mr. Eisenhauer first?

A. I could not tell you.

Q. Is it not possible that you could have gone to both people

for the bonds at the same time, as they were so close to one another?

A. No, sir. I remember well the circumstance. I made two trips. I would go to Mr. Bier and get the bonds, then go to my office and list them. My office was upstairs, right around the corner.

Q. You did not go from Mr. Bier's office to the bank?

A. No, sir.

Q. How about Mr. Eisenhauer—the same way?

A. Yes, sir. It was my habit. Extremely cautious, I generally hid them in a piece of paper and went right to my office. I would always take my numbers before going to the other place, for I did not want to lose my chance of taking the numbers before delivering the bonds.

Q. Did you deal with Mr. Bier as a broker or as a member of the New Orleans stock exchange?

A. I dealt with him as a member of the stock exchange; did not say a word to him as for whom I was buying for, nor did he tell me who he was selling for.

Q. You did not know that he was selling but for himself?

A. No, sir. We are not in the habit of disclosing the facts as for whom we are buying or selling for. I don't know up to this day that he was selling for himself, and even if I would have asked him he would not have told me.

Q. This particular bond in controversy—was it any different to the others in its appearance?

A. I saw nothing different on any of these bonds.

Q. Any mark to distinguish it from the other bonds?

A. No, sir; only the number. I generally looked at the tenor of the bond and at the signature and also at the coupon. That
37 is instinctive—to look at the coupon.

Q. When did you purchase this bond from Mr. Bier—on May the 17th?

A. I did not purchase them on May 17th. They were delivered to me on that date.

Q. The July, 1888, coupons were on them?

A. Exactly.

Q. Can you say positively that they, July coupons, were on?

A. Yes, sir; for this reason: I generally looked at the coupons and if they were not correct I would not have taken them.

Q. Those bonds were unmatured bonds?

A. I don't think the bonds are matured yet.

Q. Were the coupons on this bond in controversy paid by the State in July, 1888, and January, 1889?

A. From general report, I guess they were. I did not see them again, but I don't think Mr. McGehee is a man to leave money owed to him uncollected when he can do so. I never saw them again until he came afterwards and looked at the bonds and I saw them in his hands.

Redirect examination by Mr. RICHARDSON:

Q. Mr. Dupuy, in giving these numbers do you speak from memory or from memorandum?

A. From this memorandum. No man could remember all these numbers from memory.

Q. Without this memorandum you made on that date you can't say anything about the numbers?

A. No, sir.

(Signed) CHAS. L. C. DUPUY.

Sworn to and subscribed before me this 24th day of May, A. D. 1890.

(Signed) W. MORGAN GURLEY,
Notary Public.

38 The above testimony is taken by consent of parties, reserving all objection, except as to place, time, and form.

(Signed) F. L. RICHARDSON, *For Pl'tf.*

STATE OF LOUISIANA, }
Parish of Orleans. }

Division "D," Civil District Court.

I certify the foregoing to be a true and correct copy of the evidence adduced on the 21st day of May, A. D. 1890, in the case of J. Burruss McGehee *vs.* Henry Bier, No. 28728.

In witness whereof I append my signature and seal of office, at New Orleans, La., this 23rd day of May, A. D. 1890.

[SEAL.] ——— ———.
(Unsigned.)

(Endorsed:) No. 28728. Division "D," civil district court. J. Burruss McGehee *vs.* Henry Bier. Testimony of Chas. L. C. Dupuy, taken out of court by consent of both parties. Filed February 12, '91. (Signed) E. A. Luminais, cl'k.

39 *Continuance.*

Extract from the Minutes of May 26th, 1890.

Present: Hon. N. H. Rightor, judge.

J. B. McGEHEE
vs.
HENRY BIER. } No. 28728. Div. "D."

This case was continued with preference.

Continuance.

Extract from the Minutes of June 9th, 1890.

Present: Hon. N. H. Rightor, judge.

J. B. McGEHEE
vs.
HENRY BIER. } No. 28728. Division "D."

This case was, for want of time, continued with preference to next November term.

Motion.

Civ. Dist. C't, P'sh of Orleans.

J. BURRUSS McGEHEE
vs.
HENRY BIER. } No. 28728.

On motion of F. L. Richardson, of counsel for pl'fft in the above-entitled cause, it is ordered that def't do show cause on the 7th day of Nov., 1890, why the commission herein issued on the 14th day of May, 1890, to take the testimony of O. B. Steele & W. H. Pipes should not be read in evidence on the trial hereof.

40 Service accepted and all objections as to form waived.
(Signed) HENRY L. LAZARUS,
Att'y for Defendant.

New Orleans, Oct. 30, '90.

Continuance.

Extract from the Minutes of Nov. 10th, 1890.

Present: Hon. N. H. Rightor, judge.

J. B. McGEHEE
vs.
HENRY BIER. } No. 28728. Division "D."

This case was continued with preference.

Continuance.

Extract from the Minutes of Nov. 24th, 1890.

Present: Hon. N. H. Rightor, judge.

J. B. McGEHEE
vs.
HENRY BIER. } No. 27728. Div. "D."

This cause was, for want of time, continued with preference.

41 *Continuance.*

Extract from the Minutes of Dec. 8th, 1890.

Present: Hon. N. H, Rightor, judge.

J. B. McGehee
vs.
Henry Bier. } No. 28728. Div. "D."

This case was continued with preference.

Continuance.

Extract from the Minutes of Dec. 22nd, 1890.

Present: Hon. N. H. Rightor, judge.

J. B. McGehee
vs.
Henry Bier. } No. 28728. Division "D."

This case came on to-day for trial.

Present: F. L. Richardson, for plaintiff; H. L. Lazarus, for defendant.

After hearing pleadings & counsel the same was continued till to-morrow at 11 o'cl'k a. m.

Continuance.

Extract from the Minutes of Dec. 23rd, 1890.

Present: Hon. N. H. Rightor, judge.

42 J. B. McGehee
vs.
Henry Bier. } No. 28728. Div. "D."

This case came on to-day for trial—F. L. Richardson for plaintiff, H. L. Lazarus for defendant.

After hearing pleadings, evidence, and counsel the same was continued to Wednesday, 14th January, 1891, at 11 o'clock a. m.

Note of Evidence.

State of Louisiana:

Civil District Court, Parish of Orleans.

J. Burrows McGhee
vs.
Henry Bier. } No. 28728. Division D.

Note of evidence taken in open court on the 23rd day of December, 1890, on behalf of plaintiff, before the Hon. N. H. Rightor, judge.

Present: F. L. Richardson, for plaintiff; H. L. Lazarus, for defendant.

Counsel for plaintiff produces, offers, and files in evidence the testimony of C. L. C. Dupuy, taken by consent in the office of Judge Lazarus, and in connection with that testimony the bond No. 788 of the State of Louisiana, consols for one thousand dollars, being the bond herein sued upon and marked Exhibit "A."

43 Counsel for plaintiff also produces, offers, and files in evidence the printed report of the State treasurer for the year 1879 to the governor.

To the introduction of which counsel for defendant objects, on the ground that there is no law which makes the report of the State treasurer evidence of the facts therein contained, and is impertinent and irrelevant.

The court overrules the objection.

To which ruling of the court counsel for defendant excepts and has this note taken in lieu of a bill of exceptions.

Counsel — pl'ff also produces, offers, and files in evidence the testimony of O. B. Steele and W. H. Pipes, taken by commission herein issued, by consent.

To the introduction of which testimony counsel for defendant objects, on the ground that the witnesses undertake to testify as to contents of the books of the auditor's and the treasurer's offices, whereas only the books themselves, or certified extracts therefrom, are competent to show their contents.

The court rules that in so far as their testimony is founded upon the contents of the books it is not admissible, but in so far as they testify to their own knowledge of the offices the testimony is admissible.

Counsel for plaintiff also introduces, offers, and files in evidence the notarial act of tender of bond No. 788 before this suit was brought, annexed to the petition.

Counsel for plaintiff also produces and offers in evidence a

44 letter from the attorney general, W. H. Rogers, addressed to Scott McGhee, agent of J. Burrows McGhee, demanding the return of this bond.

Objected to as irrelevant. The objection is sustained.

It is admitted that the defendant, Mr. Bier, would swear, if present in court, that he acquired this bond in good faith in market, overt, and for value of market price, and he had no knowledge of any defect or defence against this bond, other than such knowledge as he would be presumed to have had from the publications of official reports of the State.

(Endorsed:) No. 28728. Div. "D," civil district court, parish of Orleans. J. Burrow McGhee *vs.* Henry Bier. Note of evidence for plaintiff. December 23, 1890. (Signed) O. M. Tennison, shorthand reporter. Filed February 12, '91. (Signed) E. A. Luminais, clerk.

Testimony of Defendant.

Civil District Court for the Parish of Orleans.

45 J. BURRESS MCGEHEE
vs.
HENRY BIER. } No. 28728.

Testimony taken by consent before T. Wharton Collens, notary public and short-hand reporter, January 13, '91, subject to all objections except as to manner, form, and time of taking.

Present: F. L. Richardson, Esq., att'y for plaintiff; H. L. Lazarus, Esq., att'y for defendant.

HENRY BIER sworn in his own behalf.

Direct examination by Mr. LAZARUS:

Q. You are the defendant in this case?
A. Yes, sir.
Q. You are engaged in business in the city of New Orleans?
A. Yes, sir.
Q. In what business are you engaged?
A. Stock broker.
Q. You have followed that business for a number of years?
A. I have.
Q. As a stock broker have you dealt in State bonds?
A. Yes, sir.
Q. What character of State bonds have you dealt in?
A. Louisiana fours—what is commonly called Louisiana fours.
Q. Known as consolidated bonds, issued under act No. 3 of 1874?
A. I suppose so.
Q. Have you any recollection of ever having sold to J. Burress McGehee the bond in controversy?
46 A. No; I never had any transaction with Mr. McGehee.
Q. Never had any dealings with Mr. McGehee personally?
A. Never had, sir.
Q. Does the bond in this case in any particular differ from any other bond that you have ever handled of the State of Louisiana, save and except the marks it now bears of having been filed in court?
A. No; there is no difference.
Q. Does that bond purport to be signed by the governor of the State of Louisiana?
A. Yes, sir; it has the signature of the governor, secretary of state, auditor of accounts, & also the seal of the State.
Q. And the broad seal of the State?
A. Yes, sir.
Q. The bonds of the State of Louisiana in which you dealt, how did you acquire them?
A. I bought them in open market.

Q. For full value?
A. For full value.
Q. In the regular course of business?
A. Yes, sir.
Q. Had you at any time prior to September, 1888, any knowledge or information that the late State treasurer, E. A. Burke, was a defaulter?
A. I never knew it before the official information came out.
Q. You date the period of your knowledge to the time when the general public knew?
A. Yes, sir.
Q. You knew nothing prior to that time?
A. No.
Q. Did the bond in question, so far as your knowledge goes, pass in the usual course of trade as a valid sale and good
47 delivery?
A. It did up to that time.
Q. Had you any knowledge or was there any means at your command to acquire knowledge showing what bonds, by numbers, issued under act No. 3 of 1874, were transferred by the State to the Mechanical & Agricultural College fund and to the Louisiana Seminary fund?
A. No; I had no knowledge.
Q. If, assuming as a fact that this bond which Burris McGehee says you sold to him through Charles L. C. Dupuy, his broker, at the time stated in his petition —, was it a valid and good delivery upon market at that time?
A. Yes, sir; it was. It was received by everybody as a good delivery, and no suspicion attached in the market on any of the present questioned bonds.
Q. Is there anything on the bond in question which would attract your attention or excite your suspicion as to its non-validity outside of the endorsement of the clerk's office, made since the institution of the suit?
A. No; there is no difference between this bond, as it stands now, and any other good bond of the State. The paper is genuine, the signature genuine, stamp genuine, and coupons up to that time were cut off and paid by the State treasurer.

Cross-examination by Mr. RICHARDSON;

Q. What is the number of that bond that you hold in your hand?
A. 788.
Q. You state that there was no means of ascertaining whether that was a valid bond or invalid bond?
A. There was none, to my knowledge, because even in New York, where they are so particular about numbers of bonds, the
48 official information from this State, from the State authorities, included that bond as being a good bond—the number of that bond as being a good bond.

(By Mr. LAZARUS:) Offers and introduces in evidence letters of H. W. Pipes & O. B. Steele to the New York stock exchange giving a list of outstanding valid obligations of the State, among which, counsel states, is enumerated the bond in question.

(Mr. RICHARDSON:) Counsel for plaintiff objects to that on the ground that it is not an official document and not a document which the officials of the State were authorized to give, nor could the treasurer & State auditor make bonds valid which were invalid by such a letter.

By Mr. RICHARDSON:

Q. Do you state that there was no means of finding out that the bonds were valid or invalid?

A. Not that I know, at the time.

Q. Not what you knew; I ask you whether there was any means of finding out.

A. I don't believe there was.

Q. Now, don't you know that the State treasurer issued a report in the year 1879—published an official report—stating and giving the numbers of these bonds which belonged to the State?

A. I never had knowledge of that report.

Q. Did you inquire for the report?

A. No, sir; I never knew the necessity of it. If I have had any doubts about the genuineness of this bond or any other, I would have written to the authorities in Baton Rouge if such number was a good delivery.

Q. Did you ever read any of the State treasurer's report?

49 A. Except what was condensed in the newspapers, showing the improvements of the State.

Q. You never read the pamphlet reports of any treasurer's report?

A. No, sir.

Q. Don't you know that the constitution contains an article designating all of these bonds to be null and void—these Mechanical & Agricultural College bonds?

A. Yes, sir.

Q. Did you ever read the present constitution of the State of 1879?

A. No, sir.

Q. Then if you say that there was nothing to identify the bonds, you don't mean to say there was no number on those bonds different from any other bonds?

A. Well, I mean that this number wasn't different—that this number wasn't different of any other bond.

Q. The bonds wasn't all numbered the same?

A. No. I mean I never saw two bonds of this State bearing that number. As long as I saw one number I was satisfied the bond was correct.

Q. What was it that prevented you from examining that number, comparing it with the number of bonds declared to be null and void in the constitution of 1879 and treasurer's report?

A. Because the bonds being made to bearer, being genuine in all its appearances, as to paper, stamp, and signatures, & they were largely handled from end to end and without any searches of title.

By Mr. LAZARUS:

Q. Look at that bond and state whether the State ever paid any interest upon the coupons.

A. It has, up to January, 1890, the last coupon being paid
50 July, 1889, on this bond.

Q. You stated that you hadn't read the constitution of the State?

A. Yes, sir.

Q. Are you a citizen of this State?

A. I am not.

Q. Look at article 233 of the constitution of 1879 of the State of Louisiana and state whether after reading that article and examining it critically you could discover that the bond 788, involved in this suit, is one of the bonds declared by the constitution to be null and void and held for account of the Mechanical & Agricultural College of the State of Louisiana?

A. I couldn't, for the reason that no numbers are mentioned of the bonds issued.

Q. Is there anything in that article to indicate what the bonds are that are declared to be null and void, by numbers?

A. Nothing that I can see.

Q. Then if you had examined that article would you have been any wiser than before?

A. No.

By Mr. RICHARDSON:

Q. Wouldn't you have known from reading that article that the Mechanical & Agricultural bonds were declared null and void, you wouldn't have known what numbers composed those bonds, but you would know that certain Mechanical & Agricultural College bonds were null and void, would you not?

A. Yes, sir.

Q. Then, with that hint, would you not have inquired the numbers of the bonds that would have been doubtful, which were the Mechanical & Agricultural College bonds?

51 A. No; I would simply have inquired the numbers of the bonds that would have been doubtful to me, and if the answer had been that those bonds were correct I would have been satisfied.

(Endorsed:) No. 28728. Civil district court, division D. J. Burris McGehee *vs.* Henry Bier. Testimony of Henry Bier, taken January 13th, 1891. (Signed) T. Wharton Collens, notary public & short-hand reporter. Filed Jan'y 13, '91. (Signed) Jules Vienne, d'y cl'k.

Submission.

Extract from the Minutes of January 14th, 1891.

Present: Hon. N. H. Rightor, judge.

J. B. McGehee
vs.
Henry Bier. } No. 28728. Div. "D."

This case came on to-day for trial—F. L. Richardson, for plaintiff; Henry L. Lazarus, for defendant.

After hearing pleadings, evidence, and arguments of counsel the same was submitted to the court for adjudication.

52 *Judgment.*

In this case, admitted for adjudication, the court considering the law and the evidence to be in favor of plaintiff—

It is ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, J. Burruss McGehee, and against the defendant, Henry Bier, decreeing the sale of the Louisiana State bond No. 788 to be rescinded and said Bier be condemned to take back said bond, with the coupons attached, and the sum of sixty dollars, received for the coupons paid in error, and that the said Bier be, and he is hereby, condemned to pay to plaintiff, McGehee, the full sum of nine hundred and eleven $\frac{25}{100}$ dollars, with five per cent. interest from the 17th day of May, 1888, until paid, and costs of suit.

Judgment rendered January 19th, 1891.

Judgment signed January 23d, 1891.

(Signed) N. H. RIGHTOR, *Judge.*

Motion & Order for Appeal.

Civil District Court.

J. Burruss McGehee
vs.
Henry Bier. } No. 28728.

On motion of Henry L. Lazarus, of counsel for defendant in the above numbered and entitled cause, and on suggesting to the court that in the decree herein pronounced against defendant on the 19th day of January, 1891, and signed on the 23rd day of Janu-
53 ary, 1891, there is error to the prejudice of the defendant and mover herein, and that he desires to appeal suspensively from the decree pronounced against him in the said cause—

It is ordered that Henry Bier be allowed a suspensive appeal to the court of appeals for the parish of Orleans, returnable on the second Monday in February, 1891, upon his giving bond, conditioned as the law directs.

(Endorsed:) No. 28728. Civil district court. J. B. McGehee *vs.* Henry Bier. Motion for suspensive appeal. Filed January 28th, '91. (Signed) Jules Vienne, d'y cl'k. H. L. Lazarus, att'y.

Appeal Bond.

Know all men by these presents that we, Henry Bier, as principal, and Henry L. Lazarus, as surety, are held and firmly bound unto E. A. Luminais, clerk of the civil district court for the parish of Orleans, his successors, executors, administrators, and assigns, in the sum of fifteen hundred dollars; for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seal and dated in the city of New Orleans on this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and ninety-one.

54 Whereas the above-bounden Henry Bier has this day filed a motion for appeal from a final judgment rendered against him in the suit of J. Burruss McGehee *vs.* Henry Bier, No. 28728 of the civil district court for the parish of Orleans, on the 19th day of January, 1891:

Now, the condition of the above obligation is such that the above-bound Henry Bier shall prosecute his said appeal and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of the sale of his estate, real or personal — he be cast in the appeal; otherwise that the said Henry L. Lazarus shall be liable in his place.

(Signed) HENRY BIER,
By H. L. LAZARUS, *Att'y.*
HENRY L. LAZARUS.

(Endorsed:) No. 28728. Civil district court for the parish of Orleans. J. Burruss McGehee *versus* Henry Bier. Appeal bond. Filed January 29th, 1891. (Signed) Alex. Luminais, deputy clerk.

55 Court of Appeals.

JORDAN T. AYCOCK, Appellee,
vs.
FRANK A. LEE & Co., Appellants; HENRY BIER & J. W. FAIRFAX, Called in Warranty, Appellants. } No. 827.

Judgment.

The petition of Jordan T. Aycock avers that the commercial firm of Frank A. Lee & Co. and Frank A. Lee and Hilliard Lee, composing said firm, are indebted to him *in solido* in the sum of $1,762.50, for this, to wit:

That on the 28th of February, 1889, the said firm sold to him four thousand dollars' worth of four per cent. bonds of the State of Louisiana, at 88½ cents on the dollar, amounting to $3,525.00, which was paid to them by plaintiff's check for that amount, collected and received by them, for which the said Frank A. Lee & Co. delivered to him what purported and represented to be good and lawful bonds of the State of Louisiana for the same amount of $4,000.00, which

were received and have been since kept by him and until a present date without knowledge or suspicion on his part that the said bonds were not such as represented; that he recently discovered that two of said bonds as aforesaid sold to him by said F. A. Lee & Co., each for the sum of $1,000.00, and numbered 733 & 734, are not legal bonds of the State of Louisiana, and have never been lawfully issued, but that they are a portion of a consolidated bond formerly held by the State treasurer for the use of the Agricultural & Mechanical College, and which were declared null and void after January 1st, 1880, by art. 233 of the State constitution, which said article also prohibited the General Assembly from ever making any provision for their payment; that since he discovered the invalidity of said bonds he has made amicable demand on said Frank
56 A. Lee & Co. to exchange them for two good and valid bonds of the State of Louisiana or to refund to him the price paid them by him therefor, to wit, the sum of $1,762.50, but that they refused to comply with said demand; wherefore he prays judgment against the said firm and the members thereof *in solido* for said sum, with interest and costs.

To this petition Frank A. Lee & Co., before answering, filed exceptions, which were properly overrued, the ground of exceptions assigned being stated to be that the petition disclosed no cause of action, and that plaintiff is absolutely without right to stand in judgment and maintain the suit for the matters and things in said petition contained.

Thereafter Frank A. Lee & Co. filed their answer to plaintiff's demand, the said answer being one of general denial, coupled with special admissions and averments, and concluded with call in warranty of John W. Fairfax and Henry Bier.

The respondents aver and say that on or about the 28th of February, 1889, the plaintiff called upon them, they being brokers and members of the New Orleans stock exchange, and stated that he desired to purchase $4,000.00 of Louisiana consols, otherwise known as (stamped fours); that they informed him that they had on hand only one such bond for $1,000,00, but would undertake as brokers to procure for him the bonds he desired; that it was agreed between the plaintiff and them that they were to pay 88⅛ on the dollar for said bonds; that, having one bond of $1,000.00 on hand, they borrowed from Henry Bier two bonds of a thousand dollars each (Louisiana stamped fours), and gave him in exchange therefor one bond of $500.00 and their check of $1,500.00 worth of bonds at the market rates; that among the bonds so borrowed and obtained by them from said Henry Bier was the bond No. 733, deliv-
57 ered by them to plaintiff; that the other bond referred to in plaintiff's petition, No. 734, was in their hands at the time the plaintiff offered to them to purchase, the said bond having been previously purchased and obtained by them from John W. Fairfax, who was therefor paid by them 87⅞ cents on the dollar, or $878.75, on the 27th of February, 1889; that in all of said transactions they acted in perfect good faith, used every diligence in filling the orders of the plaintiff, and in all respects complied with his re-

quest; that said bonds Nos. 733 & 734 bore no marks in any way to put them on their guard or to create their suspicion as to any nullity or invalidity thereof; that the signatures to said bonds are genuine, the great seal of the State is affixed thereto, the proper coupons are attached, and the reduction of the rate of interest duly stamped on the face thereof; that plaintiff has since asserted the validity of the bonds by collecting from the State of Louisiana the interest due and payable thereon since he became the owner thereof; that moreover he examined and inspected said bonds before consummating the transaction, accepted delivery of the same, and acted with his eyes open; that said bonds are negotiable instruments passed by delivery in the markets of the world and at the time of the delivery thereof to the plaintiff by them were recognized as genuine and valid in the markets of Europe and the financial centres of other States of the Union as well as in the State of Louisiana and city of New Orleans; that the State itself, instead of repudiating or denying the validity of said bonds, has maintained and asserted their genuineness and validity by paying the coupons attached thoreto since said bonds came into the possession of plaintiff. They therefore deny any liability whatsoever to plaintiff because if or on account of the aforesaid transactions in said bonds; that the then treasurer of the State, E. A. Burke, its agent and representative, furnished to the New York stock exchange a list of the valid outstanding bonds of the State, among which are expressly enumer-
58 ated the two bonds, Nos. 733 & 734, which plaintiff now pretends are illegal and invalid; that on the strength and on the faith of said representations and of the payment of interest as it matured they and all others engaged in dealing in the bonds were induced to believe and did believe that said bonds were good, valid, and perfect in every respect, and that in common honesty the State is estopped from asserting the contrary—

That is to say, in other words than those of the pleader, who permits himself to use this strong language, the State, for the alleged reason assigned by him, should in common honesty be precluded from asserting the invalidity of bonds the nullity of which have been proclaimed in the most public and solemn manner by the State, in the exercise of its highest sovereignty, in art. 223 of the constitution, which ordained the absolute nullity of said bonds after January 1st, 1880, and forbade the General Assembly from ever making any provisions for their payment.

The answer of Frank A. Lee & Co. concludes as follows: "That should the court, however, hold respondents liable, then and in that event they are entitled to recover judgment in warranty against John W. Fairfax for the value and price of the bond No. 734 referred — in plaintiff'- petition and purchased by respondents from said Fairfax, as above stated, for the price and sum of $878.75, with legal interest thereon from the 27th of February, 1889; and respondents are also entitled to recover judgment against said Henry Bier for the amount and value of the bond No. 733, obtained and bought from him as aforesaid on the 28th of February, 1889, viz., the price

and sum of $880.00, with five per cent. interest thereon from that date."

Respondents pray that said J. W. Fairfax and the said Henry Bier be severally cited in warranty to defend this suit; that
59 plaintiff's demand be rejected and his suit dismissed with costs, and that in the event that he should recover judgment against them and not otherwise they do have and recover like judgment in warranty against said J. W. Fairfax for the sum of $878.75 and against said Henry Bier for the sum of $880.00, with interest upon said sum- respectively as above claimed.

Exceptions to the answer and call in warranty on the ground that they disclosed no cause of action in warranty against them having been filed by J. W. Fairfax and by Henry Bier and properly overruled by the court, answers were plead by them.

All that is material to be stated of the answer of J. W. Fairfax to "said call in warranty and said plaintiff's petition" is that it avers "that said bonds described in plaintiff's petition were duly and lawfully issued for value by the State of Louisiana under the great seal thereof; that the signatures of the officers of the State thereon are genuine; that the same are valid, unmatured negotiable obligations of said State, and that said plaintiff is a holder thereof in good faith under the law merchant.

"Wherefore he prays that said suit, as well as said demand in warranty, be dismissed with costs, etc."

Henry Bier first answered the demand in warranty against him by pleading the general issue, and afterwards filed a supplemental answer, in which it was said "that as to and concerning each and every bond of the State of Louisiana of the class or description set forth in the pleadings and exhibits set forth in this cause, or of the class of bonds commonly called consolidated bonds of the State of Louisiana, or of the description of bonds provided for and issued under the warrant and authority of act No. 3 of 1874, ap-
60 proved January 24th, 1874, or under the act of the legislature referred to in the bond set up and described in the plaintiff's petition herein, this defendant never at any time purchased, held, possessed, or in any manner acquired any such bond or obligation that was not by him acquired in good faith, in the open markets of the country, before maturity thereof, in the due and regular course of trade, as commercial paper or obligations whereof the title passed by delivery, protected in the hands of innocent, good-faith third holders by the law of the land in relation thereto, and without any knowledge, information, or suspicion of any defect, defense, or equity that could under any circumstances be urged against said bonds, or in any way altering or affecting the binding effect of the contract and obligation as written in said bonds or obligations.

And, further answering, defendant saith "that as to and concerning any and all acts or supposed laws or regulations of the State of Louisiana supposed to affect, impair, or tending to impair the contract as it appears and in written in the said consolidated bonds of the State of Louisiana issued under and by virtue of the said act of the

State of Louisiana, adopted or approved January 24th, 1874, being act No. 3 of the acts of 1874 and the act referred to in said bonds, as to in any way reduce or destroy the value thereof in the hands of *bona fide* holders thereof acquired same before maturity, the same are and at all times have been null and void for repugnance to the provisions of the Constitution of the United States."

Nowhere else in the defense at pleadings in this cause are the ground- of defense more fully, forcibly, and lucidly stated than in this portion of the answer of Henry Bier to the demand in warranty against him.

Upon the issue presented by the pleadings as above set
61 forth the cause was tried in the court below, and definitive judgment there rendered as prayed for by the plaintiff and by the defendants upon their demand in warranty.

The cause is now before this court upon appeals of all of the defendants from this judgment.

A misconception of the law applicable to the case pervades and viciates the defense to the action at law, the defense of which is based upon the assumption that in respect of the transactions to which litigation relates they may invoke the benefit and protection of the principle and rule of the law merchant applicable to negotiable instruments passing by delivery, while by the facts and circumstances preceding, attending, and surrounding those transactions they are precluded from so doing. The facts and circumstances operating such preclusion are believed to have been established by proof on the trial, though to a great extent they are such as would be taken notice of judicially without proof.

The main facts of the career of E. A. Burke during the period of his connection with the government of the State as State treasurer, and especially that of the reissuance and putting in circulation by him of bonds in his possession, which while so in his possession had become and were null and void by operati-ng and effect of art. 233 of the constitution, are facts of the political and financial history of the State of the greatest public notoriety at the time, as was the fact that said Burke, after having, without authority, fraudulently reissued and put in circulation, for value received by him, said void and invalid bonds, absconded from the State, and became and is a fugitive from justice in a foreign land.

In Greenleaf on Evid., vol. one, 16 ev., page 6, at the end of the para., it is said: "In fine, courts will take notice of whatever
62 ought to be generally known within the limits of their jurisdiction. In all these and the like cases, where the memory of the judge is at fault, he resorts to such documents of reference as may be at hand that he may deem worthy of confidence, 'or,' it is said in note (a), 'to any person, or may refuse to take judicial notice of such facts unless the party calling upon him to take such notice produces books or documents which satisfied him.' Stephens Dig. Evid., art. 59. The judge may inform himself of such facts in any way which he may deem best in his discretion. United States *vs.* Terchemaker, 22 How. (U. S.), 392."

Knight *vs.* Landfear, 7 Rob., 172, and Michel *vs.* Lalantine, 10

Rob., 404, were cases similar in their main features to that now before the court, and fully sustain the view of the law taken by the district court and by the court in the present case.

In Michel *vs.* Lallantine, *supra*, the court said:

"It is evident that the note became the property of the defendant on their purchase of it on terms more advantageous to them than those at which plaintiff acquired it. They did not, therefore, act as brokers in this transaction—a circumstance which increases their responsibility for the genuineness of the note and distinguishes it from that of a broker, if it be admitted that the latter is not responsible for the genuineness of the paper he sells."

The doctrines laid down in the text books and elementary treatise in negotiable instruments are determinative of the pretensions of the defendants in the present case.

In one Daniel on Negotiable Instruments, page 756, 3rd ed., it is said:

"Paragraph 806 (11), as to the defense against which a *bona fide* holder is not protected:

There are some defenses which are as available against a
63 *bona fide* holder for value and without notice as against any other party. They are those which go to show that the instrument was utterly and absolutely void and not merely voidable (one) by reason of the incapacity of a party assuming to contract, or by reason of some positive interdiction of law, or by reason of the one consent of the party sought to be bound by the particular contract. Pp. 807, statutory denunciation of instrument as void. (2) So if the statute pronounces the contract evidenced by the bill or note to be void * * * it is an absolute nullity, and, though in form negotiable, no currency in the market and no degree of innocence or ignorance on the part of the holder can import any validity to it." * * *

The facts of the present case are *are* either identical with or so analogous to those of J. Burruss McGehee *vs.* Frank A. Lee & Co., defendants also in the present case, decided by our learned brother, the judge of the civil district court, division "A," and his reasons for the judgment rendered by him on that case are so fully and forcibly expressive of the views and conclusions of this court in the present case that we cannot do better than adopt them as our own. The opinion of the court in the case mentioned is as follows:

Plaintiff sues defendant for the recession of a sale by them to him of a certain paper denominated and represented to be a consolidated bond of the State of Louisiana for the sum of $1,000.00. The petition describes the bond in full and annexes it as a part of his pleadings.

Since the plaintiff bought the bond the State has paid coupons of interest which attached to it to the amount of $60. Before signing plaintiff tendered to the defendants the return of said bond and $60, amount of the coupons alleged by him as paid in error, but they refused to receive the same or to return the said price paid.

64 The cause of the demand for recession is alleged to be that since he purchased the State has claimed the said bond as its

property, and has demanded the return thereof, together with said $60 paid on the coupons, declaring that it was stolen by the State treasurer of the State; that said bond was one of those declared void by article 233 of the State constitution of 1879, and that his vendors were never owner- of it. He prays that the said sale be rescinded; that defendants be required by judgment to take back said bond, with $60 received from coupons attached to it, paid in error, and to restore to petitioner the said price paid for said bond.

The defendants have excepted that the petition discloses no cause of action, and that plaintiff is without right to stand in judgment and maintain this action for the grounds alleged in said petition.

For the purpose of this exception all the plaintiff has alleged must be taken as true.

If so, then defendants in May, 1888, received from plaintiff $913.75 for a paper represented to be a consolidated bond of the State, which in virtue of the — State had been declared null and void, and which was the lawful property of the State of Louisiana, and which has been claimed since said sale on the declaration that it had been stolen from the State by the late treasurer; but defendants were never owners of said bond; that he did not know said facts when he purchased, and that said bond is valueless in his hands.

In other words, the claim of plaintiff is that defendants sold him a bond which was owned by the State and not by them, and that said bond, represented as such, was in reality not a bond of
65 the State, because it had been declared null by the constitution of 1879, and that the State's possession had been diverted by a theft committed by its late treasurer, and that instead of being a valuable bond it was in reality worthless.

The art. 233 of the constitution declares the debt due by the State to the Agricultural and Mechanical fund to be $182,313.03, being the proceeds of the sales of lands and land script granted by the United States to the State for the use of a college for the benefit of agriculture and the mechanics arts, directs that said amount shall be placed to the credit of said fund on the books of the auditor and treasurer as a perpetual loan, and the State shall pay an annual interest of 5 per cent. on said amount from Jan. 1, 1880, for the use of said college, and the consolidated bonds of the State for the use of the said fund shall be null and void after Jan. 1st, 1880; and the General Assembly shall never make any provision for the payment, and they shall be destroyed in such manner as the General Assembly may direct. The article then directs how the 5 per cent. interest on this perpetual loan to the State to the credit of the college fund shall be paid.

It is manifest that these bonds (and that herein in dispute was one of them) never were put in circulation by the State for the use of said college fund "at the date of the adoption of said constitution in 1879. In other words, the Agricultural and Mechanical College fund, amounting to the sum stated in said article, was donated by the United States to the State in trust and for the use of said college. To represent it consolidated bonds of the State were held by the State in trust for said use, and these bonds the said article an-

nulled after providing different from in which said fund should be represented, and their distinction then was ordered.

66 Held there in trust for said special use in the State treasury by the State when the constitution was adopted, as said article 233 declares their issuance to their holders was a legal, nay, a constitutional, impossibility, and the direction that they should be destroyed and the declaration that they shall be null and void constitute an inhibition against any other disposition of them.

Therefore all that has been said in argument that said bonds are "negotiable instruments," circulating by delivery "from hand to hand like bank notes, thronging the channels of commerce, which they are made to seek and where they find their market," and the innocent third holders are in consequence entitled to exemption from inquiry into the equities between the original parties, is wholly inapplicable to these bonds, which never were issued and put in circulation by the State, which, while held in trust by the State for a special use, were by the constitution declared null and void after Jan. 1, 1880, and by the constitution were ordered to be destroyed.

Nor in my view is there any equitable estoppel against the State as to the bond in controversy in this suit resulting from the fact that the General Assembly failed to have it destroyed as required by the constitution or from the fact alleged that, in error, coupons attached to it were paid from State funds set apart for the payment of interests on the State debt.

The negligence of the General Assembly, the crime of the State treasurer, and the erroneous payment of the treasurer of said coupons cannot singly or operating together give vitality or validity to bonds whose nullity had been declared, whose distinction had been ordered, as of date Jan. 1, 1880, said bonds never having been

67 put in circulation by the State.

It is the sovereignty of the State alone that can create a State debt and issue and put in circulation State bonds to represent such debt, and as to this high function there are limitations both as to amount and as to the method of its exercise plainly written in the organic law and in the statute book, but this power of the sovereign State and those limitations upon its power placed there in the interest of the people would be things of little worth if the negligence or crimes or errors of public servants can issue and recognize as valid bonds absolutely void and never put in circulation by the State, and persons who have incautiously received them as valid can, by reason of such negligence, errors, and crimes, estop the State from denying that its debt has thus been wrongfully increased. Public officers or departments of the State government cannot bind the State or its people except when their official acts are authorized by the law. The acts that falsely took this bond from the treasury, where it had always been, where it was when its nullity was declared and its distinction was ordered, and fraudulently put in circulation were not official acts, but were violations of the organic law and crimes of a heinous character. Under such circumstances the equitable doctrine of estoppel as against the State *quoad* this bond cannot apply, nor can it be regarded as a negotiable instrument nor any person be

considered technically a holder without notice. A different question would be presented if this were a State bond that had been issued and put in circulation by the State. On such an issue defendants' authorities and arguments would be of great weight in the case as alleged. It appears that defendants sold to plaintiff a bond which they did not own but which was owned by the State. By our Code such a rule is of no effect, R. C. C, 2452. They sold to him a thing traffic in which the organic law prohibited; such a thing
68 by R. C. C., 2448, could not be a lawful consideration of a contract of sale. What plaintiff covenanted to purchase and what defendants covenanted to sell was a legal bond of the State. *Excontractu*, there was an implied warranty on their part that the bond belong*ing* to them, and that it was a genuine legally outstanding and negotiable bond of the State. Instead of this, what he received was a bond of no validity and absolutely worthless since Jan. 1, 1880. For this error of fact and of law as well regarding the essential quality of the bond sold, and without which plaintiff would not have purchased it, the contract may be rescinded. R. C. C., 1797, 1821, '2, '3; 1841, '2, '3, '4, & '5.

Plaintiff alleges that he was in error and acted in good faith, and he does not allege that defendants were in bad faith. R. C. C., 1843, 1842, 1821, 1822, and 1823, apply to such a case, and support the plaintiff's prayer under the allegations.

Therefore I think there was no necessity that plaintiff should have alleged bad faith or fraud against the defendants, nor that a special guarantee was given by defendants.

In my opinion, a cause of action by a person capacitated to stand in judgment thereon is set forth in the petition.

For these reasons defendants exceptions must be overruled, and a delay of ten days is allowed the defendants to answer.

No error is found in the judgment appealed from, and it is therefore affirmed with costs.

I concur, resting my concurrence upon reasons to be by me detailed in J. Burruss McGehee *vs.* F. A. Lee & Co., now pending before this court.

(Signed) FRANK McGLOIN, *Judge.*

69 (Endorsed:) No. 827. Court of appeals. Jordan T. Aycock, appellee, *vs.* F. A. Lee & Co., appellants. Henry Bier, J. W. Fairfax, called in warranty, appellants. Filed April 20th, 1891. (Signed) L. J. Doize, d'y cl'k.

Judgment.

There is no difference in any particular material to the right of the plaintiff to the relief sought by him against the defendant in this action, and which is accorded to him by the judgment herein appealed from, between the facts of this case and those of the cases of Jordan T. Aycock *vs.* Frank A. Lee & Co., J. W. Fairfax & Henry Bier, called in warranty, No. 827; J. Burruss McGehee *vs.* Frank A. Lee & Co., No. 857, and of Adolph Schreiber, tutor, *vs.* Henry Bier, No. 922 of the docket of this court.

For the reasons assigned in the opinion of both judges of this court in those cases, which are adhered to, the judgment herein appealed from is affirmed with costs.

McGehee
vs.
H'y Bier.

Rehearing refused.

70 Court of Appeals, Parish of Orleans.

J. Burruss McGehee
vs.
Henry Bier. } No. 879.

To the honorable the judges of the court of appeals for the parish of Orleans:

The petition of Henry Bier with respect represents—

That the decree pronounced by the court in the above numbered and entitled cause is erroneous, in this:

That the record does not disclose that the bond in controversy and which is claimed to be of the class proscribed by article — of the constitution as part of the bonds set aside for the Agricultural & Mechanical College fund and by said art. declared null and void was at the time of the adoption of the constitution in the possession and under the control of the State of Louisiana or of its officers, holding, by virtue of their official position, the bond or class of bonds so declared null and void, and that the article of the Constitution of the State of Louisiana herein referred to is violative of article 10, sec. 1, of the Constitution of the United States, inasmuch as said article of the constitution of the State of Louisiana impairs the obligation of the contract evidenced by the bond, which is, as appears upon its face, the obligation of the State of Louisiana

71 to pay at a fixed time a fixed and determinative sum of money, and which obligation was issued by the State of Louisiana under and by virtue of legislative and constitutional enactment, and the court in entering its decree in this cause did not, as it should have done, give full force and effect to the Constitution of the United States, and in this the court erred.

Wherefore petitioner prays that a rehearing in this cause be granted, and that upon said rehearing a decree be entered reversing the judgment of the court *a qua*, as prayed for by petitioner in his answer in said cause, and petitioner prays for all general relief.

(Signed) HENRY L. LAZARUS,
Attorney for Henry Bier.

(Endorsed:) No. 879. Court of appeals. J. Burruss McGehee *vs.* Henry Bier. Petition for rehearing. Filed March 21, '92. (Signed) T. Reilley, clerk. Henry L. Lazarus, attorney for def't.

72 Court of Appeals.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 879.

To the Hon. Frank McGloin, presiding judge of the court of appeals for the parish of Orleans, State of Louisiana :

The petition of Henry Bier, defendant in the above numbered and entitled cause, respectfully shows—

That he believes that there is error to his prejudice in the judgment of the court of appeals for the parish of Orleans, State of Louisiana, lately rendered in the cause entitled J. Burruss McGehee *vs.* Henry Bier, No. 879 on the docket of said court, in this, to wit:

1st. That the hon. the court of appeals for the parish of Orleans erred in affirming the judgment of the hon. the civil district court for the parish of Orleans in the above-entitled cause, but should have avoided, annulled, and reversed said judgment and have decided said case in favor of your petitioner or have remanded the same to the civil district court for a new trial and for further proceedings according to law.

2nd. That this hon. court erred in refusing to give full force and effect, upon the trial of the cause, to paragraph 1, section 10, of art. 1 of the Constitution of the United States, holding that art.
73 233 of the constitution of 1879 (sometimes called constitution of 1880) in no manner affected or impaired the obligation of the contract of the State of Louisiana as evidenced by its bonds, inasmuch as the State of Louisiana had the power to withdraw from circulation the obligation and to stamp the same with nullity, though said obligations were at the time of the adoption of the constitution outstanding in the hands of innocent third parties, who acquired the same in open market for value and without notice or knowledge of any defect in the issuance of said obligations, or that the same *was* subject at any time to the control of the State of Louisiana after their issuance and the acquisition thereof and before the adoption of art. 233 of the constitution of 1879 (sometimes called the constitution of 1880).

3rd. That the record in the cause failed to disclose that at the date of the adoption of the constitution of 1879 (sometimes called the constitution of 1880) that the bond in controversy and of the class alleged to be prescribed by art. 233 of the constitution of 1879 was in possession or under the control of the State of Louisiana or of its accredited officers, and that it had the power, right, or authority in said time to impair, annul, or destroy the obligation of said contract as evidenced by said bonds, and that in the absence of positive, clear, and unequivocal proof in the record that said bonds were held by the State at the time of the adoption of art. 233
74 of the constitution of 1879 said article does *ex vi* destroy the obligation of the contract evidenced as aforesaid and in repugnance to paragraph 1, section 10, of art. 1 of the Constitution of the United States of America.

4th. That in the absence of all proof the presumption is that the obligation evidenced by the bond of the State was issued by the State upon the date it bears date, to wit, January 24, 1874, and that it being outstanding in the hands of innocent holders, for value, it was not competent for the State of Louisiana to impair or destroy their validity by the adoption of the constitution of 1879, which is repugnant to the article, section, and paragraph of the Constitution of the United States as aforesaid.

And that the hon. the court of appeals for the parish of Orleans, State of Louisiana, erred in affirming the judgment rendered by the civil district court for the parish of Orleans after the refusal of said civil district court to hold, in the absence of proof, that said bonds were valid outstanding obligations of the State, and could not be impaired or destroyed by art. 233 of the constitution of 1879 without impairing the obligation of the contract, as evidenced by said bond, and that the court of appeals should have avoided, annulled, and reversed the judgment of said civil district court, and should have either ordered judgment in favor of your petitioner or should have remanded said cause to said civil district court for a new
75 trial and for further proceedings according to law, with instructions to said civil district court to determine primarily upon the record that at the time of the adoption of the constitution of 1879 that the bonds in controversy were in the possession and under the control of the State of Louisiana.

Wherefore petitioner respectfully prays that your honor will allow him a writ of error in said cause, with supersedeas, on giving bond and security according to law in such sum as your honor may deem proper, and for general relief.

(Signed) HENRY L. LAZARUS, *Attorney.*

(Endorsed:) No. 879. Court of appeals. J. Burruss McGehee *vs.* Henry Bier. Petition for writ of error. Filed May 11, '92. (Signed) —— ——.

76 *Certificate.*

STATE OF LOUISIANA:

Civil District Court, Parish of Orleans.

I, Arthur Victor Flotte, clerk of the civil district court for the parish of Orleans and *ex officio* clerk of the court of appeals for the parish of Orleans, do hereby certify that the foregoing seventy-five (75) pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced upon the trial of the cause in said court of appeals, wherein J. Burruss McGehee is plaintiff and Henry Bier is defendant, instituted in the civil district court and appealed to the court of appeals and now in the records thereof under the No. 879, with exception of the document referred to in and filed with the petition of the plaintiff in said suit as Exhibit "A," a duly certified copy of which is to be made part of the transcript, and with the exception,

also, that said transcript contains no copy of the order of the presiding judge of said court of appeals allowing a writ of error to the Supreme Court of the United States, a duly certified copy of which order of allowance is to be added to said transcript.

Seal of Civil District Court for the Parish of Orleans, State of Louisiana.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this — day of ——, in the year of our Lord one thousand eight hundred and ninety-two, and in the one hundred and sixteenth year of the Independence of the United States of America.

A. V. FLOTTE, *Clerk.*

77 Court of Appeals, Parish of Orleans.

J. BURRUSS MCGEHEE
vs.
HENRY BIER. } No. 879.

Petition for Writ of Error. Filed May 11th, 1892. (*Signed*) *L. J Doize, Clerk.*

To the Hon. Frank McGloin, presiding judge of the court of appeals for the parish of Orleans, State of Louisiana:

The petition of Henry Bier, defendant in the above numbered and entitled cause, respectfully shows that he believes that there is error to his prejudice in the judgment of the court of appeals of the parish of Orleans, State of Louisiana, lately rendered in the cause entitled J. Burruss McGehee *vs.* Henry Bier, No. 879 on the docket of said court, in this, to wit:

1st. That the hon. the court of appeals for the parish of Orleans erred in affirming the judgment of the hon. the civil district court for the parish of Orleans in the above-entitled cause, but should have avoided, annulled, and reversed said judgment and have decided said case in favor of your petitioner or have remanded the same to the said civil district court for a new trial and for further proceedings according to law.

2nd. That this hon. court erred in refusing to give full force and effect upon the trial of the cause to paragraph 1, section 10 of art. 1 of the Constitution of the United States, holding that art. 233 of the constitution of 1879 (sometimes called constitution of 1880)
78 in no manner affected or impaired the obligation of the contract of the State of Louisiana as evidenced by its bonds, inasmuch as the State of Louisiana had the power to withdraw from circulation its obligations and to stamp the same with nullity, though said obligations were at the time of the adoption of the constitution outstanding, in the hands of innocent third parties, who acquired the same in open market for value and without notice or knowledge of any defect in the issuance of said obligations, or that the same *was*

subject at any time to the control of the State of Louisiana after their issuance and the acquisition thereof and before the adoption of art. 233 of the constitution of 1879 (sometimes called the constitution of 1880).

3rd. That the record in the cause fails to disclose that at the date of the adoption of the constitution of 1879 (sometimes called the constitution of 1880) that the bond in controversy and of the class alleged to be prescribed by art. 233 of the constitution of 1879 was in the possession or under the control of the State of Louisiana or of its accredited officers, and that it had the power, right, or authority at said time to impair, annul, or destroy the obligation of said contract as evidenced by said bonds, and that in the absence of positive, clear, and unequivocal proof in the record that said bonds were held by the State at the time of the adoption of art. 233 of the constitution of 1879 said article does *ex vi termini* destroy the obligation of the contract evidenced as aforesaid, and is repugnant to paragraph 1, section 10 of art. 1 of the Constitution of the United States of America.

4th. That in the absence of all proof the presumption is that the obligation evidenced by the bond of the State was issued by the State upon the date it bears date, to wit, January, 1874, and
79 that, it being outstanding, in the hands of innocent holders for value, it was not competent for the State of Louisiana to impair or destroy their validity by the adoption of the constitution of 1879, which is repugnant to the article, section, and paragraph of the Constitution of the United States as aforesaid.

And that the hon. the court of appeals for the parish of Orleans, State of Louisiana, erred in affirming the judgment rendered by the civil district court for the parish of Orleans after the refusal of said civil district court to hold, in the absence of proof, that said bonds were valid outstanding obligations of the State and could not be impaired or destroyed by art. 233 of the constitution of 1879 without impairing the obligation of the contract as evidenced by said bond, and that the court of appeals should have avoided, annulled, and reversed the judgment of said civil district court and should have either rendered judgment in favor of your petitioner or should have remanded said cause to said civil district court for a new trial and for further proceedings according to law, with instructions to said civil district court to determine primarily upon the record that at the time of the adoption of the constitution of 1879 the bonds in controversy were in the possession and under the control of the State of Louisiana.

Wherefore petition- respectfully prays that your honor will allow him a writ of error in said cause, with supersedeas, on giving bond and security according to law in such sum as your honor may deem proper and for general relief.

(Signed) HENRY L. LAZARUS, *Attorney.*

80 Court of Appeals for the Parish of Orleans.

J. BURRUS MCGEHEE, Appellee,
vs.
HENRY BIER, Appellant. } No. 879.

On petition of Henry Bier for allowance of a writ of error to the Supreme Court of the United States from the final decree herein of March 14th, 1892.

Order Allowing Writ.

The application for the writ is based on a suggestion on behalf of Henry Bier that there was drawn in question before this court in this case the validity of an article of the constitution of the State of Louisiana, to wit, art. 233 of said constitution, on the ground that said article is repugnant to the Constitution and laws of the United States, inasmuch as it is violative of the first paragraph, sec. 10, art. 1 of said Constitution, prohibiting any State from passing any law impairing the obligation of contracts, and the decision of the court was in favor of the validity of said constitutional provision and against the operative effect and of the right, title, and privilege and exemption specially set up and claimed by said Bier by and under said clause of the Constitution of the United States, and that from the said decision a manifest error has happened to the damage of said Henry Bier.

Now, although it appears from the record of said suit that the decision thereof adversely to the pretensions of said Bier was in nowise dependent upon the solution of any questions arising
81 under the Constitution or laws of the United States, but solely upon the solution of questions arising under the constitution and laws of the State of Louisiana, the writ of error to the Supreme Court of the United States is nevertheless hereby allowed upon the petitioner giving bond, with surety, conditioned as the law requires in the sum of $1,250, to be approved by the presiding judge of this court.

(Signed) FRANK McGLOIN,
Presiding Judge, Court of Appeals,
Parish of Orleans, State of Louisiana.

New Orleans, May 25th, 1892.

Bond for Writ of Error.

Court of Appeals, Parish of Orleans, State of Louisiana.

J. BURRUS MCGEHEE
vs.
HENRY BIER.

Know all men by these presents that we, Henry Bier, as principal, and Durant da Ponte, as surety, are held and firmly bo-nd unto J. Burrus McGehee in the full and just sum of twelve hundred and

fifty dollars, to be paid to the said J. Burrus McGehee, to his attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a term of the court of appeals in the parish of Orleans, State of Louisiana, at New Orleans, La., in a suit
82 depending in said court of appeals wherein the said J. Burrus McGehee is plaintiff and the said Henry Bier is defendant, judgment was rendered against said Henry Bier, and the said Henry Bier upon proper application having obtained a writ of error from the presiding judge of said court of appeals, and having filed the same in the clerk's office of said court of appeals for the parish of Orleans, State of Louisiana, holding sessions at New Orleans, La., to reverse the judgment in the aforesaid suit, and a citation directed to the said McGehee, citing and admonishing the said McGehee to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Henry Bier shall prosecute his writ to effect an- answer all damages and costs if he fail to make good his said plea, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) H'Y BIER.
DURANT DA PONTE.

Personally appeared Durant da Ponte, who, being duly sworn, deposes and says that he is surety on the within bond; that he resides in the city of New Orleans, in the State of Louisiana, and is worth the full sum of twelve hundred and fifty dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) DURANT DA PONTE.

Sworn to and subscribed before me this 18th day of June, 1892.

{ Seal Hunter C. Leake, Notary Public, Parish of Orleans, State of Louisiana. }

(Signed) HUNTER C. LEAKE.
Notary Public.

83 The writ of error having been granted to operate as a supersedeas upon a bond of twelve hundred and fifty dollars, the said bond, having been given, is now approved by me.

New Orleans, July 12th, 1892.

(Signed) FRANK McGLOIN.
Presiding Judge.

Hon. Frank McGloin, presiding judge.

DEAR SIR: The above surety is satisfactory, and I have no objection to its being approved by you.

(Signed) F. L. RICHARDSON, *Att.*

The foregoing four and one-half pages are a true copy of the originals on file in the court of appeals for the parish of Orleans.
August 2nd, 1892.

(Signed) HENRY B. KELLY,
Presiding Judge.

84 [Endorsed:] No. 879. Court of appeals for the parish of Orleans. J. Burrus McGehee *vs.* Henry Bier. Copy of petition *of* praying for allowance of writ of error, of order of allowance of writ, of bond for writ, and of order of approval of bond. Filed Aug. 2d, 1892. T. Reilley, d'y clerk.

Endorsed on cover: Case No. 15,224. Louisiana, parish of Orleans, court of appeals. Term No., 1254. Henry Bier, plaintiff in error, *vs.* J. Burruss McGehee. Filed December 3rd, 1892.

148 US 137

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 1254.

HENRY BIER, PLAINTIFF IN ERROR,

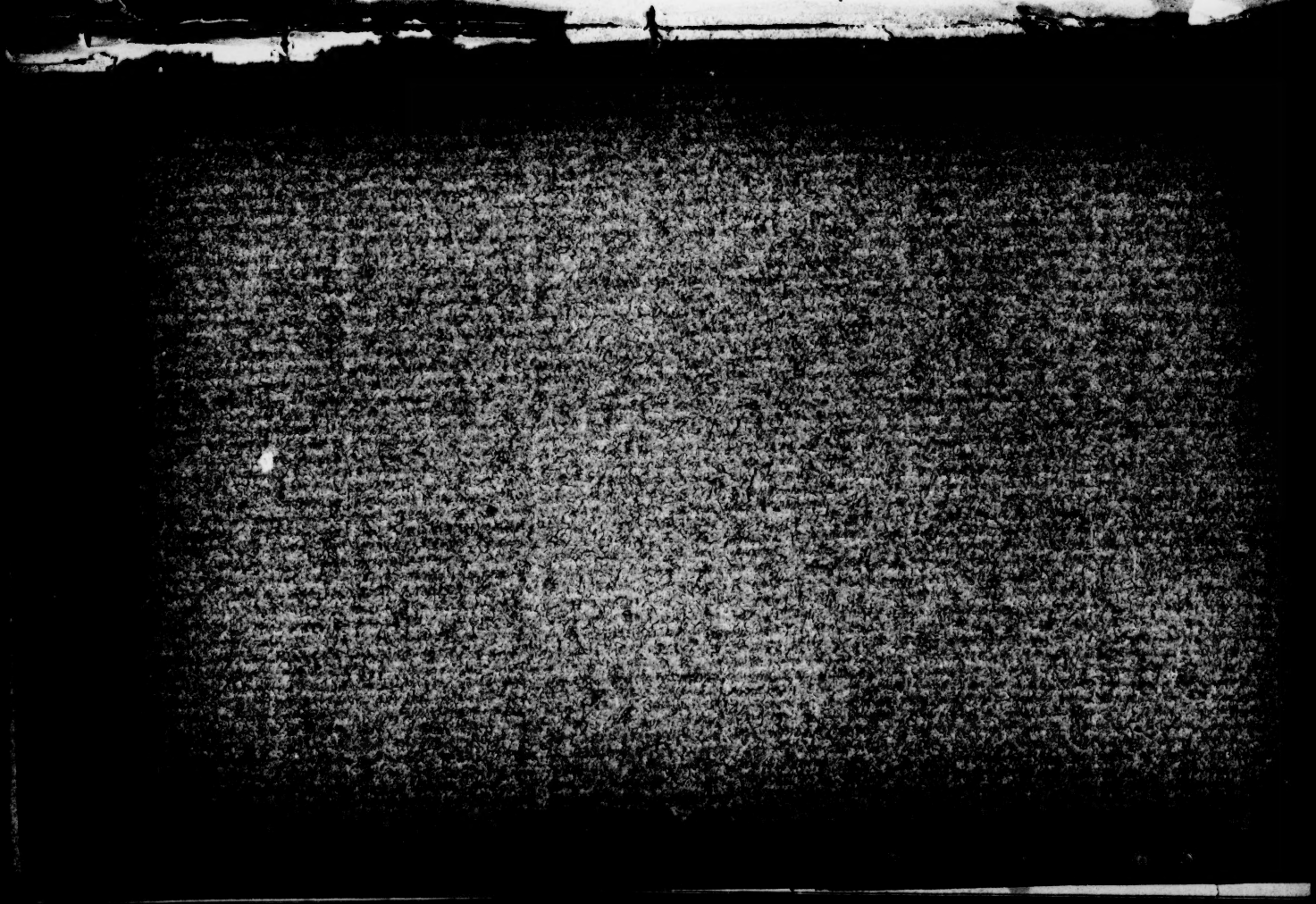
versus

J. BURRUSS McGEHEE, DEFENDANT IN ERROR.

ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

HENRY L. LAZARUS,
Counsel for Plaintiff in Error.

THOMASON PRINT, 33 NATCHEZ ST., N. O.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 1254.

HENRY BIER, PLAINTIFF IN ERROR,

versus

J. BURRUSS McGEHEE, DEFENDANT IN ERROR.

ARGUMENT OF COUNSEL FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

The petition in this case for a writ of error, and the order of the Court granting it, is set out at large at page 43 *et seq.* of the record. The controlling question in the case, and one that is determinative of the jurisdiction of this Court, is, whether Article 233 of the Constitution of the State of Louisiana, which declared that the Consolidated Bonds of the State held for the Agricultural and Mechanical College and the Louisiana Seminary Fund, were null and void, was repugnant to Section 10 of Art. 1 of the Constitution of the United States, prohibiting States from passing laws impairing the obligation of contracts.

That the Constitution is a law within the meaning of the prohibition, is no longer an open question. The Bond in controversy is said to be one of the proscribed bonds referred to in Article 233 of the Constitution of Louisiana.

Assuming this Bond to be of the class referred to in the Constitution of the State of Louisiana, it issued as appears upon its face, under Act No. 3 of the Session Acts of Louisiana of 1874; and this Act had for its authority and sanction the Constitutional Amendment of 1874.

The Bond involved in this controversy is not distinguishable from the entire issue of bonds under Act No. 3 of 1874, which represents the Consolidated Bond indebtedness of the State. It is distinguishable only by its serial number; but in all other respects it is the unconditional obligation of the State of Louisiana to pay, at a fixed and definite time, the amount called for by the bond. It has upon its face all the qualities and attributes of negotiable paper. There is nothing to identify it with any issue to the Agricultural and Mechanical College, or to the Louisiana Seminary of learning.

There is nothing upon the face of the bond that shows it was impressed with a trust of any character, or that it is subject to any condition whatever. The record in this case is utterly barren of any proof that the bonds were in the custody of the State, assuming this to be one of the bonds referred to at the time of the adoption of the Constitution, and in the absence of positive proof that the bonds were in the possession of the State or of its officers at the time of the adoption of the Constitution, it was not competent for the Legislature, or the people, speaking through a Constitutional Amendment, or acting upon a Constitution itself,

to strike with nullity bonds presumably outstanding and held by innocent third parties.

Article 233 of the Constitution of 1880 only refers in general terms to the bonds held in trust by the State for the Agricultural and Mechanical College and the Louisiana Seminary.

There is nothing in the Article itself to identify the bonds declared null and void, nor are the numbers given of the bonds stated to be held by the State for the institutions named.

There were no means at the command of the public, or dealers in the State's securities, to know specifically what bonds were affected by the State's action.

If we are driven to the Treasurer's Report, of which we shall speak hereafter, it refers to a class of bonds issued under a different law from that under which the bonds in controversy were issued.

The presumption is, if presumptions are to be indulged in, that the bond was issued upon the day it bears date; and was, from the date of its issuance, free from the control of State officials or of State action; the protection to the holder being found in the Article of the Constitution of the United States, which lays its restraining hand upon legislative bodies, and on the people of the State, preventing them from doing any act which in its effect is to destroy or impair the obligation of a contract evidenced, as in this case, by the bond itself.

It is true that the Treasurer, in his report for the year 1879, undertakes to give in Exhibit "E" to his report (a copy of which for the convenience of the Court we have hereto annexed), the numbers of the bonds held by him

for the Agricultural and Mechanical College, and the Louisiana Seminary Fund. But the bonds to which he refers are described as bonds issued under Act of 1879, and not bonds issued under Act 3 of 1874. So that if the public were to be affected by knowledge of the Treasurer's reports, they could not have been advised that the bond issued in 1874 was the bond described in the Treasurer's reports, they being referred to as bonds issued under Act 3 of 1879.

No presumptions are to be indulged in, however, in favor of a Treasurer who has proved dishonest, and whose defalcations are now matters of public history. The Constitution of 1880, which destroys or strikes with nullity the bonds of which the present bond is said be one, did not go into operation until January 1st, 1880, and there is nothing in the record to show that, at the time of its adoption, and its operation, the bond in controversy was under the control or within the custody of the State or its officers.

In the absence of evidence, establishing this fact, the provision of the Constitution which undertook to strike with nullity the bonds presumably issued on the 1st of January, 1874, is an Act which impairs the obligation of a contract, and invests this Court with jurisdiction to hear and determine this controversy.

The case here is identical in principle with the case argued at the last term of this Court, Meyer vs. Richards, and which was reassigned for argument before a full Court upon special assignment by the Court, the decision of the lower court having been affirmed by a divided Court.

We therefore respectfully submit that, upon the record as it stands, this Court has jurisdiction to hear and determine this controversy, because Article 233 of the Constitu-

tion of the State is repugnant to Art. 1 of Section 10 of the Constitution of the United States; and the effect of Art. 233 is to impair the obligation of the contract evidenced by the bonds of the State.

We therefore submit that the motion to dismiss should be discharged.

Respectfully submitted,

HENRY L. LAZARUS,

Counsel for Plaintiff in Error.

APPENDIX.

REPORT OF STATE TREASURER.

STATE OF LOUISIANA,
TREASURER'S OFFICE,
NEW ORLEANS, January 1, 1880.

To his Excellency Francis T. Nicholls, Governor of the State of the State of Louisiana—SIR: In accordance with the requirements of law (Act No. 96, Extra Session, section 80 of 1877), I respectfully submit the following report of the financial operations of this department for the past fiscal year, commencing the 1st day of January, 1879, to the 31st day of December, 1879, inclusive, embracing its receipts, disbursements, etc., from the various funds, as provided by existing laws.

The treasurer's report consists of statements A, B, C, D and E.

Statement "A" shows an account of the receipts into the State treasury from all sources from the 1st day of January, 1879, to the 31st day of December, 1879, inclusive, amounting in the aggregate to two million three hundred and sixty-five thousand seven hundred and sixty-six dollars and twenty cents ($2,365,766.20), including the balance on hand on the 1st day of January, 1879, of one hundred and twenty-one thousand nine hundred and eleven dollars and twelve cents ($121,911.40).

Statement "B" shows a detailed account of disbursements for the same period under each of the various legislative appropriations, amounting in the aggregate to two million one hundred and nineteen thousand seven hundred and thirty-three dollars and twelve cents ($2,119,733.12).

Statement "C" shows a detailed statement of the balances of each of the various funds of the State, by years, on hand on the morning of the 1st day of January, 1880, amounting in the

aggregate to two hundred and forty-five thousand eight hundred and thirty-three dollars and eight cents ($245,833.08).

Statement "D" is a tabular statement of the amount of interest received into the State treasury for the payment of the interest coupons on the consolidated State bonds issued under Act No. 3, of 1874, how disbursed, the balance cash on hand on morning of January 1, 1880, and the amount of outstanding and unpaid coupons by years, on the 1st of January, 1880, inclusive.

Statement "E" shows a detailed statement of the bonds held by the State treasurer in trust for the Mechanical and Agricultural College, and the bonds belonging to the Louisiana State University; also, of the bonds returned by A. Luria, cashier Louisiana National Bank, on June 7, 1878, in exchange of warrant No. 2,222, as per judgment of the Third District court of New Orleans, No. 25,115, and of the Supreme Court of Louisiana, No. 7,149, and pledge of the lessees of the Louisiana State Penitentiary, etc., etc.

The residue of the report is a compilation of the monthly reports of the banks, banking institutions, saving banks. etc., published in accordance with the provisions of Act No. 91, section 6, of 1877.

All of which is respectfully submitted.

E. A. BURKE, *State Treasurer.*

STATEMENT E.

Mechanical and Agricultural College.

196 bonds of $1000 each issued by the State of Louisiana under Act No. 3, of 1879, Nos. 710 to 905, inclusive	$196,000
2 bonds of $500 each issued by the State of Louisiana under Act No. 3, of 1879, Nos. 42 and 43	200
	$196,200

Louisiana State University or Seminary Fund.

164 bonds of $500 each issued by the State of Louisiana under Act No. 3, of 1879, Nos. 1902 to 2065 inclusive	$82,000
2 bonds of $500 each issued by the State of Louisiana under Act No. 3, of 1879, Nos. 4184 and 4185	200
1 bond of $1000 Consolidated Debt, City of New Orleans, dated July 1, 1852, No. 492	$1,000
	$83,200

Bonds Returned by A. Luria, Cashier Louisiana National Bank.

29 bonds of $1000 each issued by the State of Louisiana under Act No. 182, of 1857, and known as the Free School Bonds, and sold at auction in accordance with Act No. 82, of 1872, Nos. 45, 46, 47, 242, 246 to 260 inclusive, 403 to 408 inclusive, 514 to 528 inclusive	$29,000

Pledges of the Lessees of the Louisiana State Penitentiary.

Promissory Note and Certificate and Transfer for the sum of Forty-four Thousand Eight Hundred and Thirty-three dollars, amount due by the lessees of the Louisiana State Penitentiary for said lease up to and including the year 1878, as per Act No. 6, ex. session, 1878, approved March 26, 1878, said note dated December 11, 1878, and due December 11, 1880, bearing interest at the rate of per ct. per annum	$44,833

Bonds Deposited by the Louisiana Equitable Life Ins. Co.

10 bonds of $1000 each issued by the State of Louisiana under Act No. 3, of 1874, Nos. 1598, 1947, 2043, 2458, 2691, 3615, 5472, 7828, 7830, 7172	$10,000
1 bond of $500 issued by the State of Louisiana under Act No. 3, of 1874, No. 1596	500
	$10,500

UNITED STATES SUPREME COURT.

HENRY BIER, PLAINTIFF IN ERROR,

vs.

J. BURRUSS McGEHEE, DEFENDANT IN ERROR.

Writ of Error from the Court of Appeals of the State of Louisiana, in and for the Parish of Orleans.

MOTION TO DISMISS AND BRIEF OF J. BURRUSS McGEHEE, DEFENDENT IN ERROR.

On motion of F. L. Richardson of Counsel for J. Burruss McGehee, defendant in error, in the above entitled cause it is ~~ordered~~ orders that the writ of error herein taken be dismissed or affirmed at the cost of plaintiff in error, on the ground:

First: That it appears by the record herein filed that this Court is without jurisdiction to review the judgment complained of.

Second: The record does not show that the judgment of the State Court rested upon the disposition of a Federal question.

Third: The record and judgment shows that the only question presented and determined, was whether the State of Louisiana was the lawful owner of the State bond, or Henry Bier, plaintiff in error; and the Court held adversely to Henry Bier and that the Bond No. 788, was stolen from the State of Louisiana, and was never issued by any lawful authority, and that he should return the amount of money with interest to defendant in error, and accept the bond which he had sold and which was tendered him.

Fourth: By the terms of the judgment complained of, plaintiff in errror takes back the property which he had sold on the repayment of the purchase money and exercises all such rights as he had before the sale.

Fifth: The record shows that plaintiff in error cannot claim that his rights have been violated under Section 10, Article 1, of the United States Constitution, by Article 233, of the State Constitution of 1879, for the reason that the record shows that two years after the adoption of this Constitution, this bond was in the possession of the State Treasurer, and was published as State property in the State Treasurer's report of 1882, and plaintiff in error cannot complain of this Article 233, of the State Constitution, unless he was shown to have been the

owner of this bond before its adoption and his vested rights in it was divested, or that a contract was entered into by the State of Louisiana with him, and the law set forth on Article 233, of the State Constitution of 1879, was afterwards passed and the obligation heretofore created was impaired.

Frank L Richardson
of Counsel
for Burrows McGehee

UNITED STATES SUPREME COURT.

No.——

HENRY BIER, PLAINTIFF IN ERROR,

vs.

J. BURRUSS McGEHEE, DEFENDANT IN ERROR.

Writ of Error from the Court of Appeals, State of Louisiana.

Brief of Defendant in Error on His Motion to Dismiss or Affirm.

The record shows that the petition in this cause was filed on the 12th of December, 1889, and that the averments material to be stated were that on the 1st day of May, 1888, the petitioner, J. Burruss McGehee, purchased of Henry Bier, defendant, a certain State bond, No. 778, purporting to be issued by the State of Louisiana, for the sum of $1000, on

the 1st day of January, 1874, under authority of Act No. 3 of the State Legislature of 1874, for and in consideration of the sum of $911.20 paid to said Bier.

That after the purchase of said bond and payment therefor, the State of Louisiana, through its Attorney General, claimed it as its property, also the sum of sixty dollars received in payment of coupons, and that while in its possession it was stolen by one E. A. Burke from the State Treasury.

The petition further states that the bond with its coupons was so purchased by him under the full belief that said Henry Bier was the lawful owner thereof, but that he was not at the time of the sale to him or since the owner thereof, and he has good reason to believe, and so charges, that the said bond was then, and is now, the property of the State of Louisiana, and is a part of the Mechanical and Agricultural fund held by the State.

That said bond is now worthless in his hands—that defendant has refused to repay the purchase price.

And prays that defendant Bier be condemned to take back the bond which he had sold and to return the amount which he had received, $913.75 with costs.

Defendant Henry Bier denies that he had sold this bond, that if he had done so it was good and valid, and said bond was lawfully issued by the State prior to the adoption of Article 233 of the Consti-

tution of the State of 1879, and that Article in so far as its decreed said bond null and void was in violation of Section 10, of Article 10, U. S. Constitution.

Upon the trial proof of all the allegations of plaintiff's petition were made. On the trial of the case it was proved, and not denied by Bier, that he purchased these bonds after the adoption of the Constitution of th e tate in 1879. The State Treasurer's report of 1879, and the receipt from Treasurer Dubuclet to Treasurer Burke was put in evidence to show that the State was the owner of the bond. From the judgment against him Henry Bier has taken this writ of error.

The first question which presents itself is has this court jurisdiction over this controversy.

If Mr. Bier was the holder of this bond when the Constitution of 1879 was adopted declaring these bonds null, and the lower court decided in favor of this law of 1879, and thereby impaired its obligations to him there would be grounds of complaint which could be entertained by this court. This bond, with others like it, was shown to be in the treasury of the State when the Constitution of 1879 was adopted, and there could be no obligation to be impaired. Defendant does not even claim that he held it then.

A citizen has no vested rights in the general laws of the State which can preclude their amendment or repeal, and there is no implied promise on the

part of the State to protect its citizens after incidental injuries occasioned by changes in its laws. Cooley's Const, Lim. 284. The State has a right to declare bonds under its own control null and void.

The decision of the question in the lower court depends upon a question of fact as to whom this bond belongs, to whether to the State or to Bier,—and the judgment did not rest upon the disposition of a Federal question.

Upon this point there has been a number of rulings of this court which we here review, viz.:

To justify a writ of error to the Supreme Court of the United States to review the judgment of State Court, the record must show, as it does not in this case, that the judgment rested upon the disposition of a Federal question.

Marsh vs. Nicholls S. & Co., 140 U. S., 344.

Davis vs. Texas, 139 U. S., 651.

The Supreme Court of the United States will not entertain jurisdiction of a State judgment, on the ground that it decides a Federal question, where besides the Federal question it proceeded in part upon another and distinct ground not involving any Federal question is sufficient in itself to sustain the judgment, without reference to that question.

Beaupre vs. Noyes, 138 U. S., 397.

A writ of error to a State Court is not allowed as of right and ought to be sent out when the Supreme Court, after hearing, is of opinion that the issue of

the writ could only result in the affirmance of the judgment.

In Re Kemmler, 136 U. S.

The Supreme Court of the United States has no jurisdiction to review the judgment of a State Court unless a Federal question has been either in express terms or necessary effect decided by that court against the plaintiff in error.

San Francisco, City and County vs. Itsell, 133 U. S., 65.

It must appear affirmatively, not only that a Federal question was presented for decision to the State Court, on an independent ground, but that its decision was necessary for the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Johnson vs. Bisk, 127 U. S.; 300 Cook County vs. Calumet, etc., Co., 138 U. S., 635; Walker vs. Ford M. & B. Marsh Co. vs. Skinner, 139 U. S., 295; Blount vs. Walker, 134 U. S., 607.

Where the case was decided by the State Court on an independent ground broad enough to maintain the judgment, and not involving a Federal question, the Supreme Court will dismiss the writ of error without considering the Federal question.

Beatty vs. Benton, 135 U. S., 244

Hopkins vs. McLean, 133 U. S., 38.

Where two defenses were made in the State Court either of which if sustained bar the action,

and one involves a Federal question, and the other did not, and the State Court sustained them both, and gave its judgment for the defendant, the United States Supreme Court will affirm the State judgment, without considering the Federal question although it may have been erroneously decided.

Hall vs. Akers, 132 U. S., 554.

To authorize the review of State judgment by the Supreme Court of the United States it must appear that the decision of a Federal question was necessary to the determination of the case, or that the judgment could not have been given without deciding it.

Marrow vs. Brinkley, 129 U. S., 178.

Where a State decision of an alleged Federal question was not necessary to the judgment, but the Court also put its decision upon another ground not pungent to the Federal laws or Constitution of the United States, Supreme Court has no jurisdiction.

Brooks vs. Missouri, 124 U. S., 394.

Chapman vs. Crane, 123 U. S., 540.

The record must show that the federal question was necessarily involved and was decided against the plaintiff in error by the State Court. The certificate to that effect of the State Court in this order of allowance of writ of error will not supply such showing by the record.

Felix vs. Scharnweber, 125 U. S. 54.

Whether certain statutes of a State have or have not deciding force is for the State to determine, and

the determination itself involves no infraction of the Constitution of the United States jurisdiction. Duncan vs. McCall, 139, U. S. 499.

Alleged errors of a State Court as to question either of fact or of State law, are not reviewable by the Supreme Court of the United States on a writ of error in this case should be denied the very recent decisions of the Supreme Court of the United States in John I. Adams & Co. vs. Board of Liquidation, decided April 18, 1892, and reported in No. 7, p 437, of the Supreme Court Reporter, of May 10, 1892, settles the question beyond cavil, as it was there held that the ruling of a State Court upon the validity or invalidity of bonds of the State, does not present any question under federal law, but solely a question upon the construction of a State statue, from which a writ of error to the Supreme Court of the United States does not lie, and accordingly the writ obtained in the case was dismissed; see also Herwig vs. Richardson, decided May 18, 1892, by the Supreme Court of Louisiana, Southern Reporter, Volume II, No. 5, June 29, 1892, page 135.

For these reasons we respectfully urge that this court is without jurisdiction and the writ of error herein taken should be dismissed, or the judgment of the lower court affirmed.

FRANK L. RICHARDSON,
Of Counsel for J. Burruss McGehee.

NEW ORLEANS, Oct. 4, 1892.